Nos. 08-56187 & 08-56270

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOMAS MAYNAS CARIJANO; ROXANA GARCIA DAHUA; ROSARIO DAHUA HUALINGA; NILDA GARCIA SANDI; ROSALBINA HUALINGA SANDI; ELENA MAYNAS MOZAMBITE; GERARDO MAYNAS HUALINGA; ALAN CARIAJANO SANDI; PEDRO SANDI WASHINGTON; ELISA HUALINGA MAYNAS; DANIEL HUALINGA SANDI; ANDREA MAYNAS CARIAJANO; CERILO HUALINGA HUALINGA; ROMAN HUALINGA SANDI; ROSA HUALINGA; RODOLFO MAYNAS SUAREZ; HORACIO MAYNAS CARIAJANO; DELMENCIA SUAREZ DIAZ; KATIA HUALINGA SALAS; ALEJANDRO HUALINGA CHUJE; LINDA SALAS PISONGO; FRANCISCO PANAIFO PAIMA; MILTON PANAIFO DIAZ; ANITA PAIMA CARIAJANO; ADOLFINA GARCIA SANDI; AND AMAZON WATCH INC.,

Plaintiffs/Appellants/Cross-Appellees,

v.

OCCIDENTAL PETROLEUM CORPORATION AND OCCIDENTAL PERUANA, INC.,

Defendants/Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Central District of California, Case No. CV-07-5068-PSG(PJWx)
The Honorable Philip S. Gutierrez, United States District Judge

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DEFENDANTS/APPELLEES/CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATE CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATE STATUTES AND RULES

INTRODUCTION

Plaintiff Amazon Watch's Answering Brief on Cross-Appeal ("PAB") fails to provide any basis for evading the controlling California authority construing the standing requirements imposed by Proposition 64's amendments to California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq*. ("UCL"). Amazon Watch also fails to show that its limitless theory of standing—under which a plaintiff can sue for anything it chooses to investigate—comports with the requirements of Article III. And the same deficiencies that underlie Amazon Watch's lack of standing also confirm that any UCL claim fails on the merits as a matter of law. No amendment can cure these deficiencies, and Amazon Watch's UCL claim—its sole claim—should have been dismissed with prejudice.

ARGUMENT

I. Plaintiffs Do Not Dispute That the District Court Should Have Considered Defendants' Motion to Dismiss Amazon Watch With Prejudice Before Deciding Any Issue of *Forum Non Conveniens*

As Defendants have explained, the district court should have decided the issues raised by Defendants' motion to dismiss Amazon Watch's UCL claim—*i.e.*, issues of statutory standing, Article III standing, and the merits of the UCL claim—ahead of the question of *forum non conveniens*. (Defendants' Opening Brief on Cross-Appeal ("DOB") 57.) Plaintiffs' answering brief does *not* dispute that these various issues concerning the viability of the UCL claim may properly be considered ahead of questions such as *forum non conveniens*. (PAB 11-12.)

Nor could they. Where jurisdictional issues—such as standing—can be "readily determine[d]," they ordinarily *should* be decided first, ahead of threshold, non-merits issues such as *forum non conveniens*. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (questions of statutory standing may be decided even ahead of Article III standing). Moreover, because *forum non conveniens* is not itself a jurisdictional issue, even the merits of Amazon Watch's UCL claim may be decided ahead of *forum non conveniens*. *See Sinochem*, 549 U.S. at 430-31 (only jurisdictional issues *must* be decided first). Because Amazon Watch's UCL claim clearly fails as a matter of law, the district court should have resolved that issue first. *See id*. at 436 (court should decide jurisdictional issues ahead of *forum non conveniens* where doing so promotes "judicial economy").[1]

II. Amazon Watch Should Have Been Dismissed With Prejudice

The district court should have granted Defendants' motion to dismiss the claims of Amazon Watch outright and with prejudice.

[1] Contrary to what Plaintiffs suggest (PAB 11), Defendants do not contend that the motion to dismiss Amazon Watch should have been decided first because otherwise the *forum non conveniens* analysis fails. On the contrary, Amazon Watch's effort to argue that it has satisfied the UCL's standing requirements—an effort that emphasizes Peru-centered injunctive relief such as environmental clean-up and medical monitoring (PAB 55-56)—only serves to confirm that the district court's *forum non conveniens* analysis is substantively unassailable. Defendants' argument is that, under *Sinochem*, principles of judicial economy dictate that an issue such as *forum non conveniens* should not be decided first where, as here, a particular claim can readily and finally be disposed of, with prejudice.

A. Amazon Watch Lacks Statutory Standing

A plaintiff has standing under the UCL, as amended by Proposition 64, only if it has "suffered injury in fact and has lost money or property as a result of" the alleged violation of the UCL. Cal. Bus. & Prof. Code § 17204. This standing requirement means that a plaintiff must plead and prove, *inter alia*, that (1) the challenged conduct *proximately caused* the plaintiff to lose money or property; and (2) plaintiff suffered a loss of money or property that is *eligible for restitution* under that statute. (DOB 57-60.) Neither of these requirements is satisfied here.

1. Defendants Did Not Proximately Cause Amazon Watch's Voluntary Expenditure of Funds

Amazon Watch lacks statutory standing under the UCL because, as a matter of law, its only asserted injury—voluntary expenditures associated with investigating and publicizing Defendants' conduct (ER 55)—was not proximately caused by Defendants' alleged UCL violations. (DOB 59-60.)

Amazon Watch contends that the causal connection required by Proposition 64's standing requirement is no greater than the "fair traceability" required to establish Article III standing. (PAB 48-51 & n.20.) This argument is refuted by overwhelming and controlling California case authority.[2] In particular, the California Supreme Court recently addressed this very question and unanimously

[2] This argument fails for the additional reason that Amazon Watch cannot meet the Article III standard either. *See infra* at 17-20.

rejected the position advocated by Amazon Watch here. *See In re Tobacco II Cases* (*Brown v. Philip Morris USA Inc.*), 46 Cal. 4th 298, 325-26 (2009).

In *Brown*, the Court noted that the "parties disagree about the type of causation the plaintiff must demonstrate" in order to satisfy Proposition 64's requirement that the plaintiff must have "'suffered injury in fact and ha[ve] lost money or property *as a result of* the [alleged] unfair competition.'" 46 Cal. 4th at 325 (quoting Cal. Bus. & Prof. Code § 17204) (emphasis added). The Court described the parties' competing positions in terms that mirror the contrasting positions of the parties here: "Defendants claim that the phrase 'as a result of' introduced *a tort causation element* into UCL actions. In the context of this case [involving alleged false statements challenged as "fraudulent" under the UCL], this would appear to require a showing of *actual reliance* on the deceptive advertising and misrepresentations as a result of which the loss of money or property was sustained." *Id*. (emphasis added). The plaintiffs in *Brown*, by contrast, made two alternative arguments, one of which was identical to Amazon Watch's argument here, namely that "Proposition 64 was intended to do no more than require federal Constitution article III standing and that, for purposes of such standing, a plaintiff need only show that his or her injury is fairly traceable to the defendant's conduct." *Id*. at 325 n.16.[3] Emphasizing that "the overriding purpose of Proposition 64 was

[3] The *Brown* plaintiffs also argued, in the alternative, that Proposition 64 merely

to impose limits on private enforcement actions under the UCL," the California Supreme Court adopted the *Brown* defendants' position and held that the phrase "as a result of" imposes "an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." *Id*. at 326.

In reaching this conclusion, the state Supreme Court specifically rejected the view that Proposition 64 required no more than the "fair traceability" required by Article III. 46 Cal. 4th at 325 n.16; *see also Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1348 n.31 (2009) ("We note [the] UCL's standing requirements appear to be more stringent than the federal standing requirements."). The *Brown* Court acknowledged that one of Proposition 64's announced purposes was to ensure that no plaintiff lacking Article III standing could bring suit, but the Court correctly observed that the reference to article III standing may have been "intended simply to emphasize Proposition 64's requirement that only those plaintiffs who have suffered *actual injury* be permitted to prosecute private enforcement actions under the UCL." *Id*. (emphasis added). That is, the reference to Article III standing in the statement of purpose was a reference to Proposition 64's *additional* requirement that a plaintiff have "suffered *injury in fact*," Cal. Bus. & Prof. Code § 17204 (emphasis added), which is, of course, an Article III term of art. *See also Troyk*, 171 Cal. App. 4th at 1346, 1348-49 (reference to Article III

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required a vaguely defined "'factual nexus' between a defendant's conduct and a plaintiff's injury." 46 Cal. 4th at 325.

standing in Proposition 64's statement of purpose relates to the "injury in fact" element of UCL standing and not the separate causation requirement of UCL standing).[4] Moreover, the *Brown* Court held that the reference to Article III standing in the purpose provision of Proposition 64 was simply too cryptic to bear the weight that the plaintiffs sought to place on it: "In any event, we are certain that if the proponents of the initiative had intended some other standard of causation to apply, they would have said so directly *instead of using an elliptical reference to federal standing*." 46 Cal. 4th at 325 n.16 (emphasis added).

Amazon Watch's brief takes the latter quotation out of context and asserts, remarkably, that the Court thereby adopted the very Article III standard it expressly rejected. (PAB 49.) The argument is frivolous. The *holding* of *Brown* is that "actual reliance" is required in UCL fraudulent-statement cases, and that standard is not an Article III one, but is, as the Court noted, a form of "tort

[4] For the same reason, Amazon Watch is wrong in arguing that *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798 (2007), supports its position that only Article III standing is required under Proposition 64. (PAB 47-48 & n.19.) The section of *Buckland* on which Amazon Watch relies discusses Proposition 64's additional requirement, contained in a separate clause, that the plaintiff must also have suffered an "injury in fact." *Id.* at 815-17. Moreover, even with respect to the UCL's "injury in fact" requirement, Amazon Watch's argument is flawed: the suggestion that the Article III requirement of "injury in fact" is "interchangeable" with the distinct Article III requirement of "fair traceability" (PAB 48 n.20) is plainly wrong. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that "injury in fact" and "fair traceability" are separate elements of Article III standing); *Troyk*, 171 Cal. App. 4th at 1346 & n.28 (holding that the UCL's "injury in fact" clause does *not* incorporate the "fair traceability" element of Article III standing).

causation." 46 Cal. 4th at 325-26. Moreover, the very phrasing quoted by Amazon Watch negates its position: the Court rejected the *Brown* plaintiffs' effort to establish "some other standard of causation"—*i.e.*, a standard other than the ordinary causation standards the Court held to be required by Proposition 64—based on "an elliptical reference to federal standing." *Id*. at 325 n.16.

Amazon Watch notes that *Brown*'s specific requirement of "actual reliance" is "limited to cases in which a UCL action is based on a fraud theory involving false advertising" (PAB 49 n.22), *see Brown*, 46 Cal. 4th at 325 n.17, but the point is ultimately of no assistance to Amazon Watch. The Court adopted an "actual reliance" standard precisely because, in the context of the UCL fraudulent-statements case before it, that is what a "*tort causation* element" means: "there is no doubt that reliance is the causal mechanism of fraud." *Id*. at 325-26 (emphasis added). Thus, while Amazon Watch need not show "actual reliance" in this non-fraud UCL case, it still must show the applicable tort causation element. *Id*. at 326-27 (noting that the plaintiff must show, *inter alia*, that the misrepresentation was a "substantial factor" in "influencing his [or her] decision") (citation and internal quotation marks omitted).

Amazon Watch nonetheless asserts that, to the extent that tort causation is required to establish Proposition 64 standing, that does not mean proximate or legal causation, but only but-for causation. (PAB 50-51.) That is wrong. As

Brown and other cases have held, the causation required under Proposition 64 is the same "tort causation" that is generally required for analogous theories in non-UCL cases. 46 Cal. 4th at 325-26 (UCL false-statement claim requires, *inter alia*, traditional "actual reliance" and "substantial factor" causation); *see also Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855 & n.2 (2008) (Proposition 64 "imposes a causation requirement" that is the same as "*the causation element of a negligence cause of action*, and … the justifiable reliance element of a fraud cause of action") (emphasis added). Consequently, *all* aspects of traditional causation are required under Proposition 64's standing requirement, and not merely a narrow inquiry into but-for causation.

Second, any effort by Amazon Watch to distinguish the California Supreme Court's decision on the ground that *Brown* was a fraudulent-statements UCL case is ultimately self-defeating, because this case would then still be controlled by the existing case authority from the intermediate California appellate courts, which unambiguously have adopted the ordinary tort causation standard of proximate causation. As the California Court of Appeal held in *Hall v. Time*, Proposition 64 "imposes a causation requirement" that is the same as "*the causation element of a negligence cause of action*…." 158 Cal. App. 4th at 855 & n.2 (emphasis added); *see also Medina v. Safe-Guard Products, Int'l, Inc.*, 164 Cal. App. 4th 105, 115 (2008) (holding that the phrase "as a result of" imports "a *reliance or causation*

element" into the UCL); *Daro v. Superior Court*, 151 Cal. App. 4th 1079, 1099 (2007) (under Proposition 64, "there must be a causal connection between the harm suffered and the unlawful business activity"); *cf. also Troyk*, 171 Cal. App. 4th at 1349 & n.33 (formally reserving issue, but assuming arguendo that the "substantial factor" standard from negligence actions should apply).[5] Most federal district courts have similarly concluded that Proposition 64 imposes a proximate causation or reliance requirement upon UCL plaintiffs.[6]

This Court is bound by the California Supreme Court's holding in *Brown*

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[5] Amazon Watch relies (PAB 49-50) on *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688 (2007), but the case is irrelevant. The plaintiff in *Overstock* did *not* contest that proximate causation was required, *see* Respondent's Brief in *Overstock*, 2006 WL 3225012 at *29 ("Overstock has pled that it was actually and proximately damaged…"); the only issue was whether a "fraud on the market" theory was sufficient to satisfy the causation required by the UCL in a case (such as *Overstock*) that rested on false statements. 151 Cal. App. 4th at 716. Moreover, *Overstock*'s affirmative answer to that (irrelevant) question does not survive *Brown*, which requires actual reliance. *See Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1091-92, 1108 (1993) (requirement of actual reliance in fraud cases precludes invocation of "fraud on the market" theory).

[6] *See Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005); *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 947-49 (S.D. Cal. 2007); *True v. American Honda Motor Co.*, 520 F. Supp. 2d 1175, 1182 (C.D. Cal. 2007). To the extent that the early (and aberrant) decision in *Anunziato v. eMachines Inc.*, 402 F. Supp. 2d 1135, 1138-39 (C.D. Cal. 2005), suggested that Proposition 64 requires no more than "actual injury," that view has been expressly rejected by the California appellate courts—most recently by the Supreme Court in *Brown*. The *Brown* decision also vitiates Amazon Watch's reliance (PAB 46-48) on *Southern Cal. Housing Rights Center v. Los Feliz Towers Homeowners' Ass'n*, 426 F. Supp. 2d 1061, 1069 (C.D. Cal. 2005), where the district court erroneously assumed—without analysis of any pertinent California authority—that the standing requirements of Proposition 64 are identical to those under Article III.

that ordinary tort causation is required to establish standing under the UCL. *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994 (9th Cir. 2007). The above-cited intermediate appellate decisions are likewise binding on this Court absent "convincing evidence" that the California Supreme Court would likely reject their conclusion that the UCL imposes a traditional proximate causation requirement for standing. *Id*. There is no such convincing evidence. On the contrary, any suggestion that the California Supreme Court would reject cases such as *Hall* or *Medina* is refuted by that Court's express adoption in *Brown* of the *stricter* requirement of "actual reliance" in the specific context of false-statement UCL cases and by the *Brown* Court's express reliance on ordinary tort causation principles as opposed to Amazon Watch's proposed Article III standard, 46 Cal. 4th at 325-26. *See supra* at 4-7.

Lastly, Amazon Watch makes a belated and conclusory assertion that it can meet the UCL's proximate causation standard. (PAB 51.) Amazon Watch did not raise this argument in its opposition to Defendants' motion to dismiss below (ER 293-302); instead, it improperly attempted to raise the issue for the first time in a sur-reply. (ER 361.) As such, Amazon Watch has waived any such argument. *Walsh v. Nevada Dept. of Human Resources*, 471 F.3d 1033, 1037 (9th Cir. 2006).

In any event, there is no proximate causation here as a matter of law. Even assuming *arguendo* that Defendants violated the UCL in the manner alleged, those

actions did not proximately cause Amazon Watch to *choose* to undertake an investigation of those activities. As the First Amended Complaint makes clear, Amazon Watch's alleged monetary injuries were the result of its voluntary decision to "investigate and expose" Defendants' alleged activities. (ER 36, 55.) That is insufficient to satisfy the requirements of Proposition 64. *See Buckland*, 155 Cal. App. 4th at 816-19 (plaintiff failed to satisfy UCL's standing requirements when, after suspecting the deceptive practice, she *voluntarily* bought the defendant's product as part of her investigation into defendant's practices).

2. Amazon Watch Has Not Suffered a Loss of Money or Property That Is Eligible for Restitution

As Defendants have explained (DOB 58-59), the California Court of Appeal's decision in *Buckland* held that, in addition to requiring causation, Proposition 64 "limit[s] standing to individuals who suffer losses of money or property *that are eligible for restitution*." *Buckland*, 155 Cal. App. 4th at 817 (emphasis added). Amazon Watch does *not* dispute that it cannot meet this standard. (PAB 40-46.) Rather, Amazon Watch argues that *Buckland*'s holding was "reject[ed]" by *Brown*, and more broadly that *Buckland* should be disregarded as wrongly decided. (PAB 45.) Neither argument has merit.

Buckland held that the UCL's threshold requirement of a "los[s] [of] *money or property*," Cal. Bus. & Prof. Code § 17204 (emphasis added), must be construed in light of the settled rule that § 17203 of the UCL does not "authorize courts to

order *monetary remedies other than restitution* in an individual action," *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148 (2003) (emphasis added). *Buckland*, 155 Cal. App. 4th at 817. Reading these provisions together, *Buckland* correctly recognized that the requirement that a plaintiff have "lost money or property" must be understood as referring to a situation in which the plaintiff can recover that money or property as restitution under the UCL. *Id*.

This Court expressly endorsed and applied the holding of *Buckland* in *Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025 (9th Cir. 2009). In *Walker*, the plaintiff claimed that he had standing to seek an injunction under the UCL, even though he could not establish that he lost money or property in the sense required "for purposes of monetary relief under the UCL." *Id*. at 1027. This Court rejected the plaintiff's argument, holding that it was "supported neither by the language of the amended statute nor its purpose." *Id*. In reaching this conclusion, the Court specifically cited and quoted *Buckland*. *Id*. This Court further stated that the "history and purpose of the law are outlined more fully in the district court's opinion, with which we agree." *Id*. (citing *Walker v. USAA Casualty Ins. Co.*, 474 F. Supp. 2d 1168, 1172 (E.D. Cal. 2007)). The district court opinion in *Walker*—which was issued before *Buckland* was decided—relies upon the same statutory analysis that was subsequently adopted by the California Court of Appeal in *Buckland*. 474 F. Supp. 2d at 1172. The holding of *Buckland* and *Walker*—that

standing under the UCL is limited to plaintiffs whose losses of money or property are eligible for restitution—has been expressly reaffirmed and followed by another Division of the California Court of Appeal. *See Citizens of Humanity LLC v. Costco Wholesale Corp.*, 171 Cal. App. 4th 1, 22 (2009) (because plaintiff "could not allege having suffered losses which would entitle it to restitution, it has no standing to pursue a cause of action for unfair competition").

Contrary to Amazon Watch's suggestion that *Buckland* was wrongly decided and should be rejected (PAB 45-46), the decisions of the California Court of Appeal in *Buckland* and *Citizens of Humanity* are dispositive published authority that must be followed by this Court absent "convincing evidence" that the California Supreme Court would not follow them. *Ryman*, 505 F.3d at 994. Moreover, this Court's comparable decision in *Walker*, which expressly endorsed and applied *Buckland*'s holding on this very point, is likewise binding, absent "intervening controlling authority." *See FDIC v. McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992) (when sitting "[a]s a three-judge panel," this Court is "bound by [this circuit's] prior decisions interpreting state as well as federal law in the absence of intervening controlling authority"). Amazon Watch has failed to show any basis for evading these controlling decisions.

Amazon Watch asserts that *Buckland*'s interpretation of the UCL's standing provision "does not survive" *Brown* (PAB 45), but that is plainly wrong. The sole

basis for Amazon Watch's claim that *Brown* overrules *Buckland* is the California Supreme Court's unremarkable statement that "Proposition 64 did not amend the remedies provision of [Cal. Bus. & Prof. Code] section 17203." 46 Cal. 4th at 319. This observation, however, actually *supports* the holding of *Buckland* and *Citizens of Humanity*. Those cases rely on the premise that the requirement of a "los[s] [of] money or property" in the UCL's new *standing* provision (Cal. Bus. & Prof. Code § 17204) must be read to have the same long-settled meaning as the "money or property" that is eligible for restitution under the remedies provision (Cal. Bus. & Prof. Code § 17203). *Citizens of Humanity*, 171 Cal. App. 4th at 22; *Buckland*, 155 Cal. App. 4th at 817-19. *Brown*'s observation that Proposition 64 does not change the limited remedies in section 17203 *validates*, rather than undermines, the premise upon which *Buckland*, *Citizens of Humanity*, and *Walker* rest.

Amazon Watch relies on two *unpublished* California appellate decisions (PAB 40, citing *Anderson v. Riverside Chrysler Jeep*, 2007 WL 3317819 (Cal. App. Nov. 8, 2007), and *Freeman v. Mattress Gallery*, 2007 WL 3300717 (Cal. App. Nov. 8, 2007)), but these decisions may not be cited in the California state courts, *see* Cal. R. Ct. 8.1115 (formerly Rule 977), and their citation in federal court is likewise "inappropriate[]." *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1529 n.8 (9th Cir. 1995). Moreover, Amazon Watch fails to note that the *California Supreme Court denied a request to publish* these two decisions. *See* Cal. S. Ct.

Minutes 388-89 (Feb. 20, 2008) (available at <http://www.courtinfo.ca.gov/courts/minutes/documents/SFEB2008.PDF>). By contrast, the California Supreme Court denied review in *Buckland* and refused a request to depublish the decision. *See* Cal. S. Ct. Minutes 105 (Jan. 16, 2008) (available at <http://www. courtinfo.ca. gov/courts/minutes/documents/SJAN1608.PDF>). This denial of review confirms the absence of the requisite clear evidence that the state supreme court would reject the decision. *Tenneco West, Inc. v. Marathon Oil Co.*, 756 F.2d 769, 771 (9th Cir. 1985).[7]

Amazon Watch also relies on several federal district court opinions that it contends support rejection of *Buckland*. (PAB 42-45.) But a district court opinion obviously cannot provide a basis for rejecting this Court's controlling decision in *Walker*. And "opinions of other federal judges on a question of state law do not constitute 'convincing evidence that the state supreme court would decide [an issue] differently.'" *Ryman*, 505 F.3d at 995 n.1 (citation omitted). In any event,

[7] The Court's recent grant of review in *Kwikset Corp. v. Superior Court*, No. S171845 (review granted, June 10, 2009), provides no basis for concluding that there is "convincing evidence" that that Court will reject *Buckland*. The issue on which review was sought in *Kwikset* relates to the distinct question whether a plaintiff who alleges that he was misled into purchasing a product may nonetheless be denied UCL standing on the ground that he suffered no monetary injury because the product he was duped into buying gave him the "benefit of the bargain." *See* <http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1904175&doc_no=S171845> (describing question presented). Indeed, in seeking review, the petitioner in *Kwikset* noted that he *would* have UCL standing under the decision in *Walker*. *See* Petition for Review in *Kwikset*, 2009 WL 1242537 at 24-25.

the cases cited by Amazon Watch provide no basis for departing from the applicable controlling authority. Amazon Watch relies heavily on the brief unpublished district court decision in *Fulford v. Logitech, Inc.*, 2009 WL 1299088 (N.D. Cal. May 8, 2009), which erroneously suggested that *Buckland*'s and *Walker*'s standing analysis only applies to UCL cases in which restitution is sought and does not apply to an injunction-only UCL case. *Id*. at *1. *Fulford* is simply wrong on this point: the plaintiff in *Walker* sought *only* an injunction, but this Court nonetheless held that, under *Buckland*, the plaintiff could not maintain *any* UCL action because he had not suffered a loss of money or property that was redressable under the UCL. 558 F.3d at 1027. The same is true of *Citizens of Humanity*. 171 Cal. App. 4th at 22 (expressly rejecting the argument that *Buckland* did not apply because the plaintiff sought to "pursue solely an injunctive remedy"). Moreover, *Fulford*'s effort to construe the UCL's standing provision as not applying to injunction-only cases flies in the face of the California Supreme Court's recent unanimous rejection of the analogous argument that the standing provision of the Consumer Legal Remedies Act should not be applied in injunction-only cases. *Meyer v. Sprint Spectrum L.P.*, 45 Cal.4th 634, 643-44 (2009).[8]

[8] Similarly unpersuasive is *G&C Auto Body Inc. v. Geico Gen. Ins. Co.*, 2007 WL 4350907 (N.D. Cal. Dec. 12, 2007), where the court addressed the question but failed to cite (much less discuss) the controlling decision in *Buckland*. *Id.* at

In light of Amazon Watch's concession that the money it expended investigating and publicizing Defendants' alleged conduct is not eligible for restitution, Amazon Watch cannot satisfy the UCL's standing requirement as a matter of law.

B. Amazon Watch Lacks Article III Standing

Amazon Watch also cannot satisfy the requirements for Article III standing.

1. Amazon Watch's Investigative Expenditures Are Not an "Injury In Fact" That Is "Fairly Traceable" to Defendants

Amazon Watch contends that its voluntary decision to expend resources to investigate Defendants' alleged conduct, and to publicize the results, gives it Article III standing to bring suit against Defendants. (PAB 51-54.) This limitless theory of standing ignores the strictures of Article III and would allow any person with an interest in a subject to obtain standing, at its choice, by undertaking a similar investigation against almost anyone with respect to any alleged misconduct. *See, e.g., Long Term Care Pharmacy Alliance v. UnitedHealth Group, Inc.*, 498 F. Supp. 2d 187, 192 (D.D.C. 2007) ("Were an association able to gain standing

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*3-*4. The remaining decisions on which Amazon Watch relies all pre-date *Buckland*, and they fail to address the issue of whether the "los[s] [of] money or property" required by Proposition 64 must be one that is recoverable as restitution under the UCL. *See Southern Cal. Housing Rights Center*, 426 F. Supp. 2d at 1069; *Witriol v. LexisNexis Group*, 2006 WL 4725713 at *6 (N.D. Cal. Feb. 10, 2006); *see also Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA Inc*, 129 Cal. App. 4th 1228, 1260-63 (2005); *Overstock*, 151 Cal. App. 4th at 716.

merely by choosing to fight a policy that is contrary to its mission, the courthouse door would be open to all associations."); *Project Sentinel v. Evergreen Ridge Apartments*, 40 F. Supp. 2d 1136, 1139 (N.D. Cal. 1999) ("Plaintiff cannot manufacture standing by first claiming a general interest in lawful conduct and then alleging that the costs incurred in identifying and litigating instances of unlawful conduct constitute injury in fact.").

Unsurprisingly, the courts have repeatedly rejected comparable efforts to stretch Article III standing as far as Amazon Watch seeks to do here, *i.e.*, where the plaintiff asserts injuries involving (1) voluntary expenditures that form a part of an organization's mission; or (2) costs incurred in connection with litigation. *See, e.g.*, *Plotkin v. Ryan*, 239 F.3d 882, 886 (7th Cir. 2001) ("[O]rdinary expenditures as part of an organization's purpose do not constitute the necessary injury-in-fact required"); *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994) (voluntary expenditures to investigate a defendant's conduct are a "self-inflicted" harm); *Project Sentinel*, 40 F. Supp. 2d at 1139 (no standing when the only injuries alleged were "nothing more than the monitoring and investigating of housing providers" and subsequent litigation); *Center for Law & Education v. Dep't of Education*, 396 F.3d 1152, 1162 (D.C. Cir. 2005) (denying standing based on claim of "[f]rustration of an organization's objectives" where "the only 'service' impaired is pure issue-advocacy"); *see also*,

e.g., *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (costs an organization incurs to pursue litigation do not create an injury in fact); *Walker v. City of Lakewood*, 272 F.3d 1114, 1124 n.3 (9th Cir. 2001) (same).

Here, all of Amazon Watch's asserted injuries consist of expenses it voluntarily incurred in connection with its investigation and publication of Defendants' alleged conduct or in anticipation of litigation. *See, e.g.*, ER 25 (part of Amazon Watch's "mission" is "to monitor the actions of Oxy" and "lobb[y] Oxy to take corrective actions"); ER 36 ("Amazon Watch has expended financial resources and staff time to investigate and expose Oxy's activities"); ER 39 ("intensive" research, including "fact-finding mission" to Peru "to gather evidence"); ER 39-40 ("media campaign[s]" to "expose the Company's practices"). Nowhere does Amazon Watch allege any facts showing that it provides any *other* relevant services that are unrelated to its choice to investigate Defendants. (ER 25, 36-40.)

This case is therefore distinguishable from those in which "the defendant's actions *themselves*" interfered with an organization's activities, such as by injuring persons who then use the organization's services (such as counseling services) that are *unrelated* to purely investigative activities. *Fair Employment Council*, 28 F.3d at 1277 (emphasis added). This crucial difference distinguishes the cases upon which Amazon Watch relies. (PAB 51-54.) Thus, for example, in *El Rescate*

Legal Serv. v. Executive Off. of Immigration Review (EOIR), 959 F.2d 742 (9th Cir. 1992), the EOIR's policy of using incomplete and inadequate translation services at immigration hearings required the plaintiff organization to incur additional costs "*in representing clients*" *at such hearings*. *Id.* at 748 (emphasis added). Likewise, in *Havens Realty v. Coleman*, 455 U.S. 363 (1982), the salient fact was that the plaintiff organizations provided counseling services, above and beyond mere investigation and publicity, to actual victims of discrimination. *See Fair Employment Council*, 28 F.3d at 1277 (distinguishing *Havens* on this basis); *see also Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (plaintiff housing organization's "outreach and education, *i.e.*, counseling" services were harmed by discriminatory activities). Nothing comparable is alleged here because Amazon Watch does not allege any facts that would establish that it is in the business of offering other, unrelated services that have been impacted by the Defendants' actions themselves. Accordingly, Amazon Watch's investigative and related activities do not constitute a fairly traceable injury under Article III.

2. Amazon Watch's Claims Are Not Redressable

Amazon Watch also lacks Article III standing because its asserted injuries would not be "'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (citation omitted). Amazon Watch concedes that it is not entitled to any *monetary*

remedies, *see supra* at 11, but it contends that its injuries can be redressed through injunctive and declaratory relief. (PAB 55-57.) This argument fails.

Amazon Watch relies upon *retrospective* injunctive relief in the form of medical monitoring and environmental cleanup, but Amazon Watch does not allege, and cannot allege, that *it* has been medically harmed in any way or that it owns any allegedly contaminated land. The Article III standing test requires that the relief sought must redress the *particular injury-in-fact asserted* by the plaintiff that is fairly traceable to the defendant's conduct. The "essence of the redressability requirement" is that "[r]elief that does not remedy *the injury suffered* cannot bootstrap a plaintiff into federal court." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998); *see also Plotkin*, 239 F.3d at 885 ("That a plaintiff may derive satisfaction from the fact that a wrongdoer gets his just desserts does not constitute an acceptable Article III remedy."). Even assuming *arguendo* that Amazon Watch's past investigatory expenditures could give rise to an Article III injury, *that* injury would not be redressed by an injunction to conduct medical monitoring or remediation in Peru. *El Rescate Legal Services* is of no help to Amazon Watch on this point (PAB 55), because the plaintiff organization in that case sought injunctive relief to remedy *ongoing* and *prospective* injuries. 959 F.2d at 745. The same is true of *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898,

910 (2d Cir. 1993) (affirming order of injunction that prohibited *future* discriminatory advertisements).[9]

Amazon Watch also contends that *prospective* injunctive relief would redress its future injuries, because requiring Defendants to "investigate pollution levels" would allegedly obviate Amazon Watch's own future investigative expenditures. (PAB 55.) But as Defendants have explained (DOB 63 n.22), any such future, *post-filing* expenditures would be "entirely of [Amazon Watch's] own making since any future reallocation of resources would be initiated at [its] sole and voluntary discretion." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 816 (S.D. Ind. 2006), *aff'd on other grounds*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1610 (2008). "Such an optional programming decision does not confer Article III standing on a plaintiff." *Id.* Any ongoing investigation would also be inextricably intertwined with Amazon Watch's dedication of

[9] Any claim by Amazon Watch for a retrospective injunction would, of necessity, have to rest on a theory of associational standing, whereby Amazon Watch would seek to assert the interests of the individual named plaintiffs in this action. But any such argument fails, because the California Supreme Court recently held that the new standing requirements of Proposition 64 are "inconsistent with the federal doctrine of associational standing." *Amalgamated Transit Union v. Superior Court*, ___ Cal. 4th ___, 2009 WL 1838972 at *5 (June 29, 2009); *id*. at *6 (*all* named plaintiffs, including associations, must individually meet the specific standing requirements of Proposition 64). Moreover, the California Supreme Court further held that, as a matter of state law, Proposition 64 bars any representative actions under the UCL *except* for class actions—a type of suit that Amazon Watch obviously has not, and cannot, seek to bring here. *Arias v. Superior Court*, ___ Cal. 4th ___, 2009 WL 1838973 at *4 (June 29, 2009).

resources to this litigation, and would violate settled law that neither Article III standing nor UCL statutory standing can be premised on such expenses. *Walker v. City of Lakewood*, 272 F.3d at 1124 n.3; *Buckland*, 155 Cal. App. 4th at 815-17.[10]

Amazon Watch's reliance on declaratory relief (PAB 56) fares no better. A request for declaratory relief, standing alone, cannot sustain a UCL claim where none otherwise exists. *City of Colati v. Cashman*, 29 Cal. 4th 69, 80 (2002); *see also Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255, 1276-77 (2006).

C. Alternatively, Amazon Watch's UCL Claim Fails on the Merits as a Matter of Law

As noted earlier, Amazon Watch does not contest that it is entitled to no monetary relief under the UCL, and any claim for such relief necessarily fails. Amazon Watch's injunctive and declaratory claims likewise fail as a matter of law. Amazon Watch's past expenditures of money (which are its only claimed actual injury) cannot be remedied by an *injunction* under the UCL, because a court cannot use the general equitable powers of the UCL to expand the UCL's limited monetary remedies. *Korea Supply*, 29 Cal. 4th at 1148. And because Amazon Watch's post-filing investigative expenditures are inextricably intertwined with

[10] Amazon Watch's reliance on Peru-centered injunctive or declaratory relief on behalf of the Achuar fails for the additional reason that the UCL does not apply extraterritorially. *See Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 224-25 (1999) (non-California residents cannot recover under California's unfair competition law "for injuries … caused by conduct occurring outside of California's borders"); *Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal. 4th 1036, 1060 n.20 (1999).

this lawsuit (through which it seeks to further its investigation), this theory would result in the sort of bootstrap standing that *Buckland* prohibits. 155 Cal. App. 4th at 815-17 (litigation-related expenses are not recoverable under the UCL and provide no basis for standing under that statute). Moreover, as noted earlier, a request for declaratory relief, standing alone, cannot state a UCL claim where none otherwise exists. *City of Cotati*, 29 Cal. 4th at 80. Finally, because the UCL may not be applied extraterritorially, injunctive relief to remedy alleged unfair conduct abroad is not available. *Norwest Mortgage, Inc.*, 72 Cal. App. 4th at 224-25. Because Amazon Watch is not entitled to *any* relief under the UCL as a matter of law, its UCL claim fails.

CONCLUSION

To the extent the district court's judgment dismissed the claims of Amazon Watch based on *forum non conveniens*, the judgment should be vacated and remanded with instructions to dismiss the claims of Amazon Watch with prejudice. In all other respects, the judgment should be affirmed. Alternatively, the judgment should be affirmed in its entirety.

DATE: July 6, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 28.1(e)(2)(C) and 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 6,207 words, which is less than the 7,000 words permitted by Fed. R. App. P. 28.1(e)(2)(C).

Dated: July 6, 2009

/s/ Daniel P. Collins
Daniel P. Collins

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2009, I electronically filed the foregoing **Defendants/Appellees/Cross-Appellants' Reply Brief on Cross-Appeal** with the Clerk of the Court for the United States Court of Appeals by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 6, 2009

By: /s/ *Daniel P. Collins*
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