IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

PFIZER INC. *Petitioner,* vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES *Respondent,* STEVE GALFANO, *Real Party in Interest.*	Court of Appeal No. B188106 Los Angeles County Superior Court Case No. BC 327114 Trial Judge: The Hon. Carl J. West

APPLICATION TO FILE A SUPPLEMENTAL *AMICI CURIAE* BRIEF AND BRIEF *AMICI CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER ON REMAND

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APPLICATION TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER AND STATEMENT OF INTEREST OF *AMICI CURIAE*

TO THE HONORABLE PRESIDING JUSTICE, SECOND DISTRICT COURT OF APPEAL:

Pursuant to California Rules of Court rule 8.200, subdivision (c), *amici curiae* the Chamber of Commerce of the United States of America ("U.S. Chamber") and the California Chamber of Commerce ("CalChamber") respectfully request leave to file the accompanying brief in support of Petitioner Pfizer Inc. on remand of this case from the California Supreme Court following *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

The U.S. Chamber is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. In addition to the over 30,000 U.S. Chamber members located in California, countless others do business in the state and are directly affected by its litigation climate. The U.S. Chamber advocates for its members in matters before the courts, Congress, and executive branch agencies. It regularly files amicus briefs in cases raising issues of vital concern to the nation's business community. The U.S. Chamber filed briefs as *amicus curiae* when this case last came before this Court in 2006, 45 Cal. Rptr. 3d 840 (Ct. App. 2006), as well as in *Tobacco II*.

The CalChamber is non-profit business association with over 15,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before the courts by filing *amicus curiae* briefs in cases involving issues of paramount concern to the business community. Preserving the intent of California voters when Proposition 64 was passed and placed into law is but one example.

This case is of substantial interest to *amici* because it will establish an important precedent on the proper interpretation and application of class action standards under California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 et seq. In the past, this area of the law was subject to substantial abuse, giving rise to an entire litigation industry in which attorneys brought claims for minor, technical violations of law against businesses on behalf of the public at large or a class of persons, without demonstrating that anyone in the alleged class had relied on the alleged misrepresentation and experienced a loss as a result. In response, California voters passed Proposition 64 in 2004. It is essential to the business environment in California that its courts follow the letter and spirit of Proposition 64.

This *amicus* brief will assist the Court by outlining areas resolved or clarified by the California Supreme Court's decision in *In re Tobacco II Cases*: (1) class representatives must have standing to bring a UCL claim, including a showing of actual reliance; (2) that a statement is "likely to deceive" is insufficient; and (3) ordinary class action safeguards encompassed in California Civil Code § 382, which require a "community of interest," explicitly apply to UCL actions. Based on application of these principles, the intent of Proposition 64, and mainstream consumer law of other states, the brief will respectfully urge this Court to reaffirm its July 11, 2006 decision finding the Respondent Court's November 22, 2005 Order certifying a class was in error.

September 18, 2009

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INTRODUCTION AND SUMMARY OF ARGUMENT

The California Supreme Court has remanded this case for further consideration in light of its ruling in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009). *Tobacco II* reaffirms that named class representatives must meet the standing requirements of the UCL as amended by Proposition 64, regardless of what may be required of absent class members. Following Proposition 64, the California Supreme Court recognized that actual reliance is a required element of standing in cases alleging fraud under the UCL. A "likelihood of deception" is no longer sufficient. Even when the named class representative has standing, California class action law, which now explicitly applies to UCL claims, requires that class representative's claims be typical of the members that they seek to represent.

In amending the UCL in 2004, California voters sought to end perceived abuse of the statute. Most importantly, they sought to curtail litigation brought by attorneys who did not represent an injured client. *See, e.g.*, John Wildermuth, *Measure Would Limit Public Interest Suits*, S.F. Chron., May 31, 2004, at B1. These suits typically alleged technical violations of the law and effectively extorted settlements due to their nuisance value. *See People ex rel. Lockyer v. Brar,* 115 Cal. App. 4th 1315, 1317 (2004); *see also* Amanda Bronstad, *Nail Salons Sued Under Unfair Competition Law*, L.A. Bus. J., Dec. 16, 2002, at 12. Such claims were particularly destructive to small businesses that lacked the resources to resist such demands. *See, e.g.*, Monte Morin, *State Accuses Law Firm of Extortion*, L.A. Times, Feb. 27, 2003, at 5. Proposition 64 addressed this situation by requiring plaintiffs to show injury-in-fact and causation,

i.e. that the consumer relied on the alleged misrepresentation and suffered a loss of money or property as a result. *See* Cal. Bus. & Prof. Code § 17204 (as amended by Prop. 64).

Further, voters sought to draw a line between private lawsuits and government enforcement actions brought to protect California consumers. "Private attorney general" claims had proliferated, yet lacked the safeguards applicable in ordinary class actions. These safeguards, provided by Code of Civil Procedure section 382 and a substantial body of California case law, serve the critical purpose of protecting the due process rights of defendants who might otherwise be forced to try massive lawsuits involving thousands or even millions of individuals where the claims have little in common. Proposition 64 applied standing requirements to class representatives and explicitly mandated application of class action standards to their claims, while protecting the government's ability to take broad action to protection consumers. *See In re Tobacco II Cases*, 46 Cal. 4th at 313-14.

The case before this Court on remand is brought on behalf of all California consumers who purchased Listerine mouthwash during a six-month period in which some labels and advertisements suggested that the product was "as effective as floss." Here, the class representative asserts only that he saw and purchased Listerine due to one specific type of label, yet he seeks to represent class members who purchased products with different labels, viewed television commercials that he never saw, or made purchases for reasons having nothing to do with the labels or advertising campaign. Mr. Galfano does not allege that he "saw, read, or in any way relied on the

advertisements; nor do they allege that they entered into the transaction *as a result of* those advertisements," with respect to Listerine with different labeling or allegedly due to a television commercial. *See Pfizer Inc. v. Superior Court (Galfano)*, 45 Cal. Rptr. 3d 840, 852 (Ct. App. 2006), *review granted and opinion superseded*, 51 Cal. Rptr. 3d 707 (2006), *cause transferred* (Aug. 19, 2009) (emphasis in original). Thus, even the *named class representative* fails to meet the standing requirement of the UCL with respect to these types of claims.

Finally, as *Tobacco II* also makes clear, actual reliance is required of class representatives who assert they were misled by an advertisement. Given the fact that there are numerous reasons why California consumers purchase Listerine and that the alleged misrepresentation appeared only for a fleeting period on some product labels, the claims of the class representative are not typical of every other person who purchased Listerine during this period. This Court should not accept Plaintiff's invitation to eviscerate Proposition 64 and reinstate this vastly overbroad class.

ARGUMENT

I. CLASS REPRESENTATIVES MUST HAVE STANDING TO BRING A UCL CLAIM, WHICH INCLUDES A SHOWING OF RELIANCE ON ALLEGED MISREPRESENTATIONS

The first matter resolved by *Tobacco II* is that Proposition 64 explicitly requires representatives of a putative class who bring a UCL claim to have standing. *See* 46 Cal. 4th at 313-14; Cal. Bus. & Prof. Code § 17203 (as amended by Prop. 64) ("Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section

382 of the Code of Civil Procedure. . . ."). The law was designed to ensure that those bringing UCL actions are directly affected by the alleged violation and its outcome. "Private attorney general lawsuits," brought on behalf of the public without an injured client, are no more.

A substantial portion of the California Supreme Court's analysis in *Tobacco II* involved consideration of whether Proposition 64 required each absent class *member* to show injury in fact and causation. *See* 46 Cal. 4th at 314-24. The Court found that the rules of class certification "do not require that unnamed class members establish standing but, insofar as standing is concerned, focus on the class representative." *Id.* at 318. It also recognized, however, that before reaching the question of whether a class action may be certified, the named representatives must establish standing. *See id* at 319 (quoting *Vuyanich v. Republic Nat'l Bank of Dallas,* 82 F.R.D. 420, 428 (N.D. Tex. 1979), for this proposition).

Proposition 64 altered the UCL to provide that a private action may only be brought by "a person who has suffered injury in fact and has lost money or property *as a result* of the unfair competition." *Tobacco II*, 46 Cal. 4th at 324-25 (quoting § 17204) (emphasis added). "As a result of" imposes a causation requirement and, as the Court understood, "there is no doubt that reliance is the causal mechanism of fraud." *Id.* at 326. Moreover, the Court recognized 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.* For this reason and consistent with this Court's

2006 ruling, *see* 45 Cal. Rptr. 3d at 852-53, the California Supreme Court concluded that "this language imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." *Id.* Thus, any plaintiff bringing a UCL action alleging he or she was misled by an advertisement is required to show actual reliance on the advertisement at issue.

Here, the class representative, Mr. Galfano, claimed that Pfizer advertised and promoted Listerine in a misleading manner that led some consumers to believe that Listerine is effective as the use of dental floss in reducing plaque and gingivitis. Nothing in *Tobacco II* changes the fact that he does not even claim that he personally relied on three of the four allegedly misleading labels or the television commercials at issue, each of which varied in its message. He therefore has no standing to pursue this representative action on behalf of anyone beyond those who purchased Listerine bottles in reliance on the particular (red) label that he viewed and allegedly led to his purchase.

II. "LIKELIHOOD OF DECEPTION" IS INSUFFICIENT

In Plaintiff's supplemental opening brief, he argues that *Tobacco II* held that Proposition 64 "did not abolish" the "likely to deceive" standard for purposes of standing to sue. *See* Plaintiff's Brief at 4. In fact, the Court held no such thing. As this Court correctly held in 2006, there is no way to reconcile this position with Proposition 64's new standing requirements, and Plaintiff's argument misunderstands the *Tobacco II* ruling.

The Supreme Court did mention the "likely to deceive" standard in its decision, but it was referring neither to current law *nor* to the concept of standing. Indeed, the Court mentioned "likely to deceive" only in one passage that was likely intended as historical background, since every case cited in the passage was decided *prior to* Proposition 64, and that passage is then followed by a section entitled "Impact of Proposition 64." *See Tobacco II*, 46 Cal. 4th at 312-13. There is no support here for Plaintiff's suggestion that merely showing a "likelihood of deception" is enough to give him standing to sue on behalf of all California consumers who purchased Listerine during the relevant period, which would be flatly contrary to Proposition 64 and *Tobacco II*.

Plaintiff's argument actually appears to be based on different language to the effect that certain forms of *relief* may be available "without individual[ized] proof of deception, reliance and injury." *See* Plaintiff's Brief at 4 (citing Tobacco II, 46 Cal. 4th at 320 n.14). Again, however, even if this were equivalent to the "likely to deceive" standard, Plaintiff is simply wrong to suggest that this has anything to do with standing after Proposition 64.

Indeed, the Supreme Court itself made this distinction quite clearly on the very same page Plaintiff cites. *See Tobacco II*, 46 Cal. 4th at 320 (citing differences between the language of the class-representative-standing requirement in current section 17204 and the "patently less stringent" language of section 17203 with respect to relief). The Court appears to contemplate that, assuming a named representative could demonstrate personal standing, and that a class could also be properly certified -

- which would depend as usual on an assessment of, for example, typicality and adequacy of representation, *see id.* at 319 – then it might be appropriate to award certain kinds of relief to the class as a whole if liability were established. *Id.* at 319-20. For example, because injunctive relief may operate "in *futuro*" to prevent injury, it follows that injunctive relief might ultimately extend in a sense to persons who have not been injured. *Id.* at 320.

Tobacco II certainly did not mean, as Plaintiff appears to contend, that after Proposition 64 he can still pursue a case on behalf of others, or even on his own behalf, if all he can show was that a practice may be "likely to deceive" someone. This Court should reject any such suggestion, as doing so would largely eviscerate Proposition 64, again subjecting California businesses to the expense and unfairness of being sued by parties who cannot seem to locate anyone actually injured by a particular business practice.

III. A CLASS ACTION MAY NOT BE CERTIFIED ABSENT MEETING THE "COMMUNITY OF INTEREST" REQUIREMENT

Even assuming that the Plaintiff has standing, class certification cannot be maintained here. The proposed class remains overbroad and fails to encompass a well-defined community of interest as required by Section 382.

The California Supreme Court's decision in *Tobacco II* recognizes the applicability of Section 382 to representative actions brought under the UCL. *See* 46 Cal. 4th at 318. The high court recognized that Proposition 64 did not alter class

action standards, but Proposition 64 did explicitly apply these requirements to UCL actions. *See id.*

The "community of interest" requirement encompasses the need to show (1) that questions of law or fact predominate over individual issues; (2) representation by plaintiffs who have claims typical of the class; and (3) class representatives that can adequately represent the class. *See Bennett v. Regents*, 133 Cal. App. 4th 347, 354 (2005). These requirements help ensure that class actions do not provide a mechanism to ignore the fundamentals of tort law through aggregation of claims and do not allow plaintiffs to prove liability through generic showings of elements of causes of action.

As noted, *Tobacco II* recognizes a clear distinction between standing and the community of interest requirement. *See id.* at 319. As the California Supreme Court stated, "Representative parties who have a direct and substantial interest have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation." *Id.* (quoting 7AA Wright et al., Federal Practice and Procedure (3d ed. 2005) § 1785.1, pp. 388-89); *see also Galfano*, 45 Cal. Rptr. 3d at 849.

That typicality and adequacy is absent here, where the claim alleges that California consumers were misled by a specific advertisement on a particular Listerine label or television commercial and purchased the product because of that misrepresentation. "As effective as floss" statements were included on bottle labeling

and aired on television for only a brief period of time. The representation appeared on some, but not all, product labels between June 28, 2004 and January 7, 2005. There were numerous reasons, however, that a California consumer might choose to purchase Listerine regardless of whether it was or was not as effective as floss. These reasons may include freshening breath, brand loyalty, taste, comparative pricing, coupons or other promotions, its benefit in reducing plague and gingivitis, and its use as a supplement to brushing and flossing. In addition, evidence indicates that there were 34 different Listerine mouthwash bottles, 19 of which never included any statement comparing Listerine to floss. *Galfano,* 45 Cal. Rptr. 3d at 853 n.8. Given this situation, it is not only possible, but probable, that many consumers who purchased Listerine never viewed the alleged misrepresentation and, even if they did, made their purchase entirely for other reasons. *See Kwaak v. Pfizer Inc.*, 881 N.E.2d 812, 818 (Mass. App. Ct. 2008) (reaching this conclusion with respect to similar Listerine claim).

Courts in states that have applied class action rules similar to those applied in California courts have recognized that class certification of consumer claims is improper in analogous circumstances. For example, a 2006 ruling by the United States Court of Appeals for the Seventh Circuit is instructive. In that case, the class representative claimed that Coca-Cola's marketing practices led her to believe that the sweetener used in fountain Diet Coke (aspartame and saccharin) was the same as that used in bottled Diet Coke (aspartame only). *See Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006). She brought a claim under Illinois' consumer fraud statute on

behalf of any person in the state who purchased fountain Diet Coke for consumption from 1999 until the date of class certification. *See id.* at 510. The class representative claimed she was deceived and suffered a loss, thereby meeting standing requirements, but recognized that Coke's marketing of the product may have been only a minor factor in the purchasing decisions of other class members. *See id.* In fact, evidence suggested that some class members who knew of the presence of saccharin in fountain Diet Coke bought it regardless. *See id.* The Seventh Circuit affirmed the trial court's denial of class certification because many Coke purchasers had not been deceived and because the named plaintiff's claims were not typical of the putative class. *See id.* at 514. The court recognized that the proposed class "could include millions who were not deceived and thus have no grievance." *Id.*

The Pennsylvania Supreme Court has also rejected class certification in a case involving whether Sunoco misled consumers into believing that high-octane fuel enhances engine performance. *See Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001). In that instance, there were questions as to whether each plaintiff heard and believed the defendant's representations, and purchased gas in reliance on such advertising. *See id.* As the court found, "the statute clearly requires, in a private action, that a plaintiff suffer an ascertainable loss as a result of the defendant's prohibited action . . . The questions of fact applicable to each individual plaintiff would thus be numerous and extensive." *Id.* For that reason, the court concluded that individual questions of fact would predominate and the lack of commonality precluded class certification. *See id.*

Likewise, the Supreme Court of Texas has rejected a consumer class action brought on behalf of 20,000 dentists alleging that the makers of software deceptively advertised their product when there was no evidence that purchasers actually and uniformly relied upon the defendant's representations in purchasing the software, particularly when there was evidence that some relied on recommendations from colleagues in making the purchase. *See Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693-94 (Tex. 2002). As the court recognized with respect to the need to show reliance, "[t]he procedural device of a class action eliminates the necessity of adducing the same evidence over and over again in a multitude of individual actions; it does not lessen the quality of evidence required in an individual action or relax substantive burdens of proof." *Id.* at 694-95.

Each of these state high courts applied traditional class action standards to preclude certification because the named plaintiff's claims were not typical of the putative class or because individual issues of reliance predominated. Similarly, class certification in this case would allow a class representative to sue on behalf of numerous California consumers who purchased Listerine for different reasons than the class representative and includes those who are not injured at all. Proposition 64 explicitly applies class action safeguards to representative actions under the UCL, and certification would be inappropriate here even if Mr. Galfano himself had standing.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reaffirm its July 11, 2006 decision finding the Respondent Court's November 22, 2005 Order certifying a class was in error. Regardless of whether absent class members must show "standing," here the proposed class does not meet ordinary standards of predominance and typicality required by California Code of Civil Procedure § 382, which Proposition 64 explicitly applied to representative actions brought under the UCL.

Dated: September 18, 2009

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I, Natasha Mosley, an attorney duly admitted to practice before all courts of the State of California and a member of the law firm of Shook, Hardy & Bacon L.L.P., attorneys of record for *amici curiae* the Chamber of Commerce of the United States of America and California Chamber of Commerce, hereby certify that the attached brief complies with the form, size and length requirements of California Rules of Court rule 8.204(b) and (c) in that it was prepared in proportionally spaced type in Times Roman 13-point, double spaced, and contains 2,992 words (including the headings, footnotes, and quotations, but excluding the tables of contents and authorities, and this certification) as measured by using the word count function of "Word 2000."

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I HEARBY CERTIFY THAT ON THIS 18th day of September, 2009, I caused an original and four copies of the foregoing Application to File an Amici Curiae Brief and Brief *Amici Curiae* of the Chamber of Commerce of the United States of America and California Chamber of Commerce in Support of Petitioner on Remand to be manually filed with the clerk of the Court of Appeals. I also caused a copy to be mailed via First Class Mail to the following recipients, four copies to be mailed to the clerk of the Supreme Court and one copy mailed to the clerk of the Superior Court in compliance with Cal. R. App. Pro. 40.1(a) and Cal. R. App. Pro. 44(b)(2):

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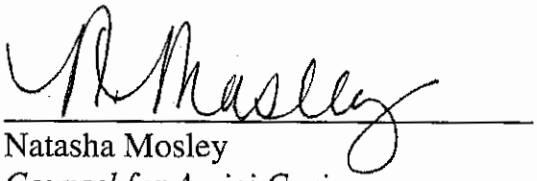

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