

Case No. B188106

COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE

PFIZER INC.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
LOS ANGELES COUNTY,
Respondent,

STEVE GALFANO,
Real Party in Interest.

After an Order Transferring the Above-Entitled Cause from the
Supreme Court of the State of California
Case No. S145775

SUPPLEMENTAL OPENING BRIEF

R. Duane Westrup (SBN 58610)
Christine C. Choi (SBN 205656)
WESTRUP KLICK, LLP
444 W. Ocean Blvd., Ste. 1614
Long Beach, CA 90802
Phone: (562) 432-2551
E-Mail: cchoi@wkalaw.com

Allan A. Sigel (SBN 24908)
Law Offices of Allan A. Sigel
1125 Gayley Avenue
Los Angeles, CA 90024
Phone: (310) 824-4070
E-Mail: aas@sigellaw.com

Attorneys for Plaintiff and Real Party in Interest, Steve Galfano

Service on District Attorney of Los Angeles County and California
Attorney General, Consumer Law Section, as required by Business and
Professions Code Section 17209

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rules 8.208, 8.490, 8.494, 8.496, & 8.498)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(d)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(d)(2)):

<u>Full Name of Interested Person:</u>	<u>Nature of Interest:</u>
Steve Galfano	Plaintiff/Real Party in Interest
Pfizer, Inc.	Defendant/Petitioner

Dated: September 2, 2009

Respectfully submitted,
WESTRUP KLICK LLP

By: 
CHRISTINE C. CHOI

444 West Ocean Boulevard
Suite 1614
Long Beach, CA 90802-4524
(562) 432-2551

*Attorneys for Plaintiff and
Real Party in Interest, STEVE GALFANO*

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INTRODUCTION

On August 19, 2009, the California Supreme Court transferred the above-entitled cause to the Court of Appeal, Second District, Division Three, with directions to vacate its decision and to reconsider in light of In re Tobacco II (2009) 46 Cal.4th 298. Pursuant to California Rules of Court, Rule 8.200(b), Real Party in Interest Steve Galfano ("Plaintiff") hereby serves and files this supplemental opening brief.

BACKGROUND

Defendant Pfizer Inc. ("Defendant") is the manufacturer of Listerine mouthwash ("Listerine"). Defendant launched a national "Flossing Claim" advertising campaign, wherein Defendant represented to consumers that Listerine is "As Effective As Floss."

As part of its "Flossing Claim" campaign, Defendant affixed shoulder labels on its Listerine bottles with the representation "As Effective As Floss." In addition, Defendant ran television commercials on countless national television and radio stations.

Plaintiff purchased a bottle of Listerine. Plaintiff testified that he was misled by Defendant's "As Effective As Floss" label and that he purchased the bottle of Listerine because it had such a label.

Subsequent to his purchase, Plaintiff filed an action against Defendant alleging that Defendant violates the law through its advertising of Listerine in a manner that warrants that Listerine can replace the use of dental floss. Plaintiff's complaint contains causes of action for false advertising, pursuant to Business and Professions Code section 17500 *et seq.* ("Section 17500"); and unfair competition as a result of Defendant's unlawful, unfair, and fraudulent business practices, pursuant to Business and Professions Code section 17200

et seq. ("Section 17200").

Section 17500 prohibits anyone from making statements that are "untrue or misleading, and that are known, or by the exercise of reasonable care should be known, to be untrue or misleading", in order to induce consumers to purchase property or services. Bus. & Prof. Code §17500. Section 17200 prohibits "any unlawful, unfair, or fraudulent business acts or practices", including deceptive or misleading advertising prohibited pursuant to section 17500. Bus. & Prof. Code §17200.

The trial court certified a class of all persons who purchased Listerine, in California, from June 2004 through January 7, 2005, finding substantial evidence to support each class certification requirement for Plaintiff's UCL claims. In finding that common questions of law and fact predominate, the trial court relied on case law which holds that "California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance and injury. [Citations.]" See Massachusetts Mut. Life Ins. Co. v. Superior Court (2002) 97 Cal.App.4th 1282, 1288, 119 Cal.Rptr.2d 190.

Defendant filed a petition for writ of mandate, seeking a directive from the Second District to vacate the trial court's order certifying a class action. On July 11, 2006, the Second District granted Defendant's petition, directing the respondent court to vacate its order granting Plaintiff's motion for class certification.

LEGAL DISCUSSION

I. PROPOSITION 64 DID NOT REQUIRE THE REPRESENTATIVE PLAINTIFF TO ESTABLISH THAT EACH PUTATIVE CLASS MEMBER SUFFERED AN INJURY IN FACT AND LOST MONEY OR PROPERTY AS A RESULT OF A DEFENDANT'S UCL VIOLATION.

In granting Defendant's petition, the Second District concluded that Proposition 64 required each class member to show injury in fact and causation. Thus, the Second District construed the text of Proposition 64 as requiring absent members to affirmatively demonstrate that they met Proposition 64's standing requirements-injury in fact and the loss of money or property as a result of the unfair practice, stating:

...Proposition 64 requires private representative actions to satisfy the procedural requirements applicable to class action lawsuits. [Citation omitted.] In order to meet the "community of interest" requirement of Code of Civil Procedure section 382, which requires, inter alia, the class representative to have claims *typical* of the class, it is insufficient if the class representative alone suffered injury in fact and lost money or property as a result of the violation [i.e., meets the new standing requirements of Proposition 64]. (§§ 17204, 17535.) *The class members being represented by the named plaintiff likewise must have suffered injury in fact and lost money or property as a result of the unfair competition or false advertising. (Ibid.)*

Pfizer, Inc. v. Superior Court (2006) 141 Cal.App.4th 290, 302-303 (emphasis added). The California Supreme Court, however, recently concluded that such a construction of Proposition 64 is erroneous. In re Tobacco II (2009) 46 Cal.4th 298, 315.

In In re Tobacco II, the California Supreme Court addressed the precise

question of “who in a UCL class action must comply with Proposition 64's standing requirements, the class representatives or all unnamed class members, in order for the class action to proceed?” *Id.* at 306. The Court concluded “that standing requirements are applicable only to the class representatives, and not all absent class members.” In so doing, the Court “reversed [the lower court’s] order of decertification to the extent it was based upon the conclusion that all class members were required to demonstrate Proposition 64 standing.” *Id.*

II. PROPOSITION 64 DID NOT ABOLISH THE “LIKELY TO DECEIVE” STANDARD UNDER THE UCL.

The Second District also held, “the mere likelihood of harm to members of the public is no longer sufficient for standing to sue. Persons who have not suffered any ‘injury in fact’ and who have not lost money or property as a result of an alleged fraudulent business practice or false advertising (§§ 17204, 17535) cannot state a cause of action based merely on the ‘likelihood’ that members of the public will be deceived.” *Pfizer, supra*, 141 Cal.App.4th at pp. 296, 304.

Contrary to the Second District’s holding, the California Supreme Court in *In re Tobacco II* ruled that Proposition 64 did not overrule the Supreme Court’s previous decisions “under which restitution may be ordered without individual proof of deception, reliance, and injury if necessary to prevent the use or employment of an unfair business practice.” *In re Tobacco II* (2009) 46 Cal.4th 298, 320 (internal quotations and citations omitted).

CONCLUSION

In light of the holdings made In re Tobacco II (2009) 46 Cal.4th 298, as described above, Plaintiff respectfully requests that the Second District affirm the trial court's order certifying a class of all persons who purchased Listerine, in California, from June 2004 through January 7, 2005.

Dated: September 2, 2009

Respectfully submitted,
WESTRUP KLICK LLP

By: 
CHRISTINE C. CHOI

444 West Ocean Boulevard
Suite 1614
Long Beach, CA 90802-4524
(562) 432-2551

*Attorneys for Plaintiff and
Real Party in Interest, STEVE GALFANO*

CERTIFICATION

I, Christine C. Choi, an attorney at law duly admitted to practice before all the courts of the State of California and an associate of the law firm of Westrup Klick LLP, attorneys of record herein for plaintiff and real party in interest Steve Galfano, hereby certify that this document (including the memorandum of points and authorities headings, footnotes, and quotations, but excluding the tables of contents and authorities and this certification) complies with the limitations of Rule of Court 14(c) in that it is set in a proportionally-spaced 13-point typeface and contains 1,065 words as calculated using the word count function of WordPerfect.

By: 
CHRISTINE C. CHOI

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 444 West Ocean Boulevard, Suite 1614, Long Beach, California 90802.

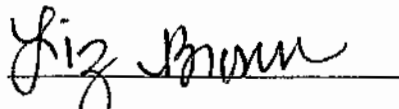
On September 3, 2009, I served the following documents described as **SUPPLEMENTAL OPENING BRIEF**. I served the documents on all interested parties, as follows:

PLEASE SEE ATTACHED SERVICE LIST

The documents were served by overnight delivery. I enclosed the documents in a sealed envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury that the foregoing is true and correct.

Date: September 3, 2009


LIZ BROWN

Service List

Jeffrey S. Gordon
KAY SCHOLER LLP
1999 Avenue of the Stars, Suite 1600
Los Angeles, California 90067

Attorneys for Defendant/Petitioner Pfizer, Inc.

The Honorable Carl J. West
Los Angeles County Superior Court
Central Civil West
600 South Commonwealth Avenue, Department 311
Los Angeles, California 90005

Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 South Spring Street
Los Angeles, California 90013

Los Angeles County District Attorney
210 West Temple Street, 17th Floor
Los Angeles, California 90012