COURT OF APPEAL CASE NO. B188106
(Los Angeles Superior Court *Steve Galfano v. Pfizer Inc.*, Case No. BC 327114)

COURT OF APPEAL OF THE STATE OF CALIFORNIA

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.

Los Angeles Superior Court Hon. Carl J. West, Presiding

PETITIONER'S SUPPLEMENTAL OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(C.R.C., Rule 8.208)

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

Name of Interested Entities/Persons:	**Nature of Interest:**
Pfizer, Inc.	Defendant/Petitioner

Dated: September 18, 2009

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Petitioner Pfizer Inc. ("Pfizer") submits this Supplemental Opening Brief, pursuant to Cal. Ct. R. 8.200(b), in response to the Supreme Court of California's order of August 19, 2009, transferring this case back to this Court "to vacate its decision and to reconsider in light of *In re Tobacco II Cases* (2009) 46 Cal.4th 298."

PRELIMINARY STATEMENT

The Supreme Court's decision in *Tobacco II* provides no basis to change the conclusion this Court reached in its unanimous July 11, 2006 decision, *Pfizer Inc. v. Galfano*, 141 Cal.App.4th 290 (2006) – that the trial court "erred as a matter of law in certifying a class of 'all persons who purchased Listerine, in California, from June 2004 through January 7, 2005,'" because "the class definition is plainly overbroad and must be set aside." *Id.* at 307 & n.8 (Opinion p. 19 n.8).[1] Because, as the Supreme Court explicitly held in *Tobacco II*, its decision is limited to the issue of the standing requirements for the named plaintiff and did not change the law of restitution under the UCL, the decision provides no basis for overturning this Court's prior ruling. It is just as true after *Tobacco II*, as it was before, that the class certified below includes consumers who purchased one of 19 Listerine bottles "that never included any label that made any statement

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[1] For the convenience of the Court, we refer herein to this Court's de-published decision, as it appears in the Lexis data base as 141 Cal.App.4th 290, as well as to the typed opinion ("Op.") originally issued by this Court.

comparing Listerine mouthwash to floss" or one of the 15 bottles that on occasion had such a label but that in other instances did not. 141 Cal.App.4th at 307 n.8 (Op. p. 19 n.8). The class definition also includes a significant number of consumers whom survey evidence shows were not misled by the "effective as floss" advertising claim. Thus, the class definition remains too broad because it includes substantial numbers of class members who were never exposed to the alleged false statements at issue, or who were not misled by them, and, thus, are not entitled to restitution under Section 17203 because they indisputably suffered no injury. Accordingly, the class should not have been certified.

Tobacco II makes clear that nothing in the decision "enlarges . . . the substantive rights [or] remedies of the class." 46 Cal.4th at 321, 324. Accordingly, as before, the remedies under the UCL are "limited to injunctive relief and restitution." *Id.* at 312 (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003)). Here, injunctive relief is not an issue because Pfizer indisputably discontinued the advertisements in question in January, 2005 (EXP 855-56), and sold the Listerine business in 2006. As for restitution, even with *Tobacco II*'s holding that absent class members are not required to demonstrate standing under Proposition 64, the class definition here continues to include numerous purchasers of Listerine – indeed, based on undisputed survey evidence, a *majority* of such purchasers (EXP 688, 703, 712) – who suffered *no* injury

whatsoever from the "effective as floss" ad campaign for Listerine, and, thus, are not entitled to restitution even under the "less stringent" *Tobacco II* standard applicable to absent class members. 46 Cal.4th at 320.

Tobacco II in no way changed what the Courts of Appeal uniformly have held – that "nonrestitutionary disgorgement is not available to a private plaintiff, regardless of the nature of the UCL proceeding as a class action." *Feitelberg v. Credit Suisse First Boston LLC*, 134 Cal.App.4th 997, 1020 (2005). *Accord, Madrid v. Perot Sys. Corp.*, 130 Cal.App.4th 440, 459-61 (2005). The focus in "restitutionary disgorgement" is "on the *plaintiff*'s loss." *Feitelberg*, 134 Cal.App.4th at 1013 (emphasis added). Accordingly, "the amount of restitution" that may be awarded in a UCL action is that amount "necessary to make *injured* consumers whole," it "must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statute, and that measurable amount must be supported by evidence." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 697-98 (2006) (emphasis added). And these "*measurable amounts*" must have been "*wrongfully taken* by means of an unfair business practice." *Id.* at 698 (quoting *Day v. AT&T Corp.*, 63 Cal.App.4th 325, 339 (1998) (emphasis by the Court).

It is, thus, plain that restitutionary disgorgement cannot be awarded to a class member who has not suffered any injury, and nothing in *Tobacco II* is to the contrary. Put another way, even though under *Tobacco*

II standing is not required for absent class members, they cannot recover, and cannot be within the class, if they were never exposed to the advertising in question or were not misled by it. To be sure, in the context of holding that absent class members do not have to meet the standing requirements that Proposition 64 imposes on the class representative, the Supreme Court stated that "the language of section 17203 with respect to those entitled to restoration – 'to restore to any person in interest any money or property, real or personal, *which may have been acquired*' (italics added [by the Court]) by means of the unfair practice" – is "less stringent than the standing requirement for the class representative." 46 Cal.4th at 320. But whatever that less stringent standard may mean, it surely does not mean that someone is somehow injured and entitled to restitution where they *never* saw a label or advertisement for Listerine regarding floss, or saw such a label or advertisement but did *not* take away the alleged false implied message that he or she could cease flossing (which survey evidence shows is the majority of purchasers), or where they are a life-long Listerine purchaser and who bought Listerine before, during and after the ad campaign in question and without reference to it.

Significantly, the Listerine ad campaign at issue is very different from that at issue in *Tobacco II*. Here, Pfizer used the "effective as floss" campaign for a little over six months, the majority of bottles did not contain the "effective as floss" claim, there is no evidence that a majority –

let alone all – Listerine consumers saw any of the four different television commercials with the "effective as floss" campaign (which did not run continuously), and there are plainly millions of consumers who bought Listerine before, during and after the "effective as floss campaign." (EXP 855-60, 867-71). Moreover, it is undisputed that Listerine is effective in reducing plaque and gingivitis and is an effective breath freshener, and, thus, all purchasers received a benefit from the product. (EXP 208, 214, 728, 855, 866). This is in striking contrast to the facts in *Tobacco II*, where defendants were alleged to have made pervasive fraudulent statements about the lack of addictiveness of nicotine in multiple media over the course of "decades." 46 Cal.4th at 306.

It is one thing to say that restitution can be awarded to purchasers of cigarettes where the cigarettes were marketed as part of a massive, sustained decades-long fraudulent advertising campaign on the grounds that the tobacco companies "may have" "acquired" the purchase price as a result of such a pervasive fraudulent campaign. It is quite another to say that restitution can be awarded to (the majority of) Listerine purchasers whom the evidence indisputably shows *did not* purchase Listerine because of the "effective as floss" campaign and indisputably were *not* misled by it. Because it is not possible to determine which members of the putative class bought Listerine based on the ad campaign without individual

inquiries of the members, the class, as this Court previously ruled, is not ascertainable and should not have been certified.

We further note that since this Court's 2006 decision in this case, appellate courts in Massachusetts and Illinois have held in cases involving the same commercials and labels as those at issue here that a class should not be certified. In *Kwaak v. Pfizer Inc.*, 881 N.E.2d 812 (Mass. App. Ct. 2008), the Appeals Court of Massachusetts reversed a class certification order on the same grounds that this Court did in its earlier decision – that the class definition was overly broad because it included purchasers who were neither exposed to nor misled by the "as effective as floss" ad campaign. In *Elder v. Pfizer Inc.*, No. 05 CH 00633 (Ill. App. Ct. July 28, 2009), the Illinois Appellate Court held that "individual issues predominated over common issues of fact" with respect to the plaintiff's claim under the Illinois Consumer Fraud Act because "individual inquiries" would have to be made "into whether each member of the class saw, heard or read the ads in question, were deceived by them, and then suffered injury because of them." (Ex. A, pp. 4-5).[2] The same is true here.

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[2] A copy of the Appellate Court's decision in *Elder* is attached hereto as Exhibit A. A copy of the trial court's decision in *Elder* was included in Pfizer's submission of Foreign Authorities that accompanied Petitioner's Response. A copy of the New York trial court's decision, *Whalen v. Pfizer Inc.*, Index No. 600125/05 (N.Y. Sup. Ct. Sept. 28, 2005), denying certification of a class in a case, like *Elder* and *Kwaak*, that involved the same ads (continued...)

Finally, any ruling that restitutionary disgorgement can be provided to absent class members who were never exposed an "as effective as floss" Listerine commercial or label, or who did not take away an implied false message that Listerine could be substituted for floss, would raise substantial questions under the First Amendment and the broader free speech guarantee in this State's Constitution.

Accordingly, this Court should again issue a writ of mandate requiring the Respondent Court to vacate its November 22, 2005 Order of class certification.

THE SUPREME COURT'S RULING IN *TOBACCO II*

At issue in *Tobacco II* was the "alleg[ation] that the tobacco industry defendants violated the UCL by conducting a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease." *Tobacco II,* 46 Cal.4th at 306. The Court quoted the "prefatory allegations" of the complaint as follows:

> "Through a fraudulent course of conduct that has spanned decades, Defendants have manufactured, promoted, distributed or sold tobacco products to Plaintiff and thousands of California citizens and residents, knowing, but denying and concealing that Defendants' tobacco products contain a highly addictive drug known as nicotine. Unbeknownst to the

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as those at issue here, appears at EXP 1442-55. The decision in *Whalen* was not appealed.

> public, Defendants have intentionally controlled and manipulated the amount and bio-availability of nicotine in their tobacco products to create and sustain addiction to their products." (*Id.* at 307).

The trial court certified a class action on the plaintiffs' § 17200 UCL claim, defining the class as: "'All people who at the time they were residents of California, smoked in California one or more cigarettes between June 10, 1993 to April 23, 2001, and who were exposed to Defendants' marketing and advertising activities in California.'" 46 Cal.4th at 306. After enactment of Proposition 64, defendants filed a motion for decertification, which the trial court granted and the Court of Appeal affirmed. *Id.* at 310-11. The Supreme Court then granted plaintiffs' petition for review.

At the outset, the Supreme Court explained that "the UCL class action is a procedural device that enforces substantive law by aggregating many individual claims into a single claim . . . . It does not change that substantive law, however. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462 ('Class actions are provided only as a means to enforce substantive law.')." 46 Cal.4th at 313 (citations omitted). "This remains true even after passage of Proposition 64." *Id.* The Court also reiterated that California courts should "look" to federal law "when seeking guidance on issues of class action procedure." *Id.* at 318 (citing *Caro v. Procter & Gamble Co.*, 18 Cal.App.4th 644, 656 n.7 (1993)). In addition to stating

that the federal "requirements" of Fed. R. Civ. P. 23(a) – numerosity, commonality of issues, typicality, adequacy of representation – "are analogous to the requirements for class certification under Code of Civil Procedure section 382," the Court stated that "[u]nder both federal and state procedure, a prerequisite to class certification is the existence of an ascertainable class." *Id.* at 318.

Turning to the first of the two issues before it, the Court differentiated between the standard for class membership and the standard for standing: "Although, with respect to whether [an ascertainable] . . . class exists, it has been said that '[t]he definition of a class should not be so broad as to include individuals who are without standing to maintain the action on their own behalf,' such references do not support the proposition that all class members must individually show they have the same standing as the class representative in order to be part of the class." 46 Cal.4th at 318 (citation omitted). The Court then concluded that "nothing in the express language of Proposition 64" or the "accompanying ballot pamphlet materials" "purports to alter accepted principles of class action procedure that treat the issue of standing as referring only to the class representative and not the absent class members," and that "[a]pplying Proposition 64's standing requirements to the class representative but not the absent class members enlarges neither the substantive rights nor the remedies of the class." *Id.* at 321, 324.

The Court was equally clear in deciding "the second question before us" – "the meaning of the phrase 'as a result of' in section 17204's requirement that a private enforcement action under the UCL can 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.' (§ 17204.)." 46 Cal.4th at 324-25. Acknowledging that "there is no doubt that reliance is the causal mechanism of fraud" and that "it is clear that the overriding purpose of Proposition 64 was to impose limits on private enforcement actions under the UCL," the Court "conclude[d] that this language imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." *Id.* at 326. In particular, the "plaintiff must plead and prove . . . reliance . . . by showing that the defendant's misrepresentation . . . was 'an immediate cause' of the plaintiff's injury-producing conduct," which a "plaintiff may establish . . . by showing that in its absence the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct." *Id.* (citation omitted). "While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause." *Id.* "It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision." *Id.* (citation omitted). Finally, the Court stated that "where, as here, a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not

required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements." *Id.* at 328.

In sum, the Supreme Court held that Proposition 64 did not change either the procedural law governing class certification or the "substantive rights nor the remedies" under the UCL, and its *Tobacco II* decision was limited to two holdings – that Proposition 64's "standing requirements" apply only to the named plaintiff and that, to satisfy these requirements, the named plaintiff must plead "actual reliance." 46 Cal.4th at 321, 324, 326.

ARGUMENT

I.

TOBACCO II DID NOT CHANGE THE STANDARDS FOR ESTABLISHING A § 17200 CAUSE OF ACTION OR FOR CLASS CERTIFICATION

As noted above, the issue before the Court in *Tobacco II* was "standing" – "the meaning of the phrase 'as a result of' in" Proposition 64's amendment of section 17204 to permit a private enforcement action under the UCL to be brought only "by 'a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.'" 46 Cal.4th at 324-25. As the Court explicitly stated, Proposition 64's standing requirement "enlarges neither the substantive rights nor the remedies of the class." *Id.* at 321, 324. They remain what they were before Proposition 64 was passed. Shortly after deciding *Tobacco II*, the Supreme Court reitera-

ted that the reach of Proposition 64 was limited to the standard for "standing." *See Arias v. Superior Ct.*, 46 Cal.4th 969, 978 (2009); *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct.*, 46 Cal.4th 993, 1000 (2009). *See also Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223, 232 (2006) (Proposition 64 "withdraws the *standing* of persons who have not been harmed *to represent those who have*") (emphases added); *Branick v. Downey Savings & Loan Ass'n*, 39 Cal.4th 235, 240 (2006) (same).

Accordingly, as before, the remedies under the UCL "are limited" and the only monetary relief a court may order is restitution. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144, 1150 (2003). In particular, as the Supreme Court held in *Korea Supply*, under the UCL, "restitution is limited to restoring money or property to *direct victims* of an unfair practice" – a "restitutionary form of disgorgement" – and "*non*restitutionary disgorgement" is not a permissible UCL remedy. *Id.* at 1148, 1150-51 (emphasis added). As the Court stated, although (under pre-Proposition 64 law) the UCL "allows any consumer to combat unfair competition by seeking an injunction against unfair business practices," only "*[a]ctual direct victims* of unfair competition may obtain restitution as well." *Id.* at 1152 (emphasis added).

For example, in *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal.4th 116, 138 (2000), the Supreme Court held that *only* those present

and former tenants who were overcharged were entitled to refunds. And, as the Supreme Court acknowledged in *Mervyn's*, "now, as before [enactment of Proposition 64], a private person may recover restitution *only* of those profits that the defendant has *unfairly obtained from such person* or in which such person *has an ownership interest*." 39 Cal.4th at 232 (emphasis added) (citing *Korea Supply,* 29 Cal.4th at 1144-50). As Galfano himself noted in his petition for review to the Supreme Court, under Section 17203, money may only be "restore[d]" to a plaintiff where it was "acquired *by means of* a violation of the UCL." (Pet. 22-23 & n.3) (emphasis in original).

Applying *Korea* and *Kraus*, the Courts of Appeal uniformly have held that "nonrestitutionary disgorgement is not available to a private plaintiff, regardless of the nature of the UCL proceeding as a class action." *Feitelberg v. Credit Suisse First Boston LLC*, 134 Cal.App.4th 997, 1020 (2005). *Accord, Madrid v. Perot Sys. Corp.*, 130 Cal.App.4th 440, 460-61 (2005).[3] By contrast, "[w]ith restitutionary disgorgement, the focus is on the *plaintiff's loss*." *Feitelberg,* 134 Cal.App.4th at 1013 (emphasis added). Accordingly, "the amount of restitution" that may be awarded in a UCL ac-

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[3] *See Madrid*, 130 Cal.App.4th at 455: "The object is to *return* to the plaintiff funds *in which he or she has an ownership interest*. (*Ibid.*) Thus, plaintiff's assertion that defendants received ill-gotten gain does not make a viable UCL claim *unless* the gain was money in which plaintiff had a *vested* interest." (emphasis added) (citation omitted).

tion is that amount "necessary to make *injured* consumers whole" and it "must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 697-98 (2006) (emphasis added). As the Court stated in *Colgan*, these "'*measurable amounts*'" must have been "*wrongfully taken* by means of an unfair business practice." *Colgan*, 135 Cal.App.4th at 698 (quoting *Day v. AT&T Corp.*, 63 Cal.App.4th 325, 339 (1998)) (emphasis by the Court). *See Feitelberg*, 134 Cal.App.4th at 1012 ("restitutionary awards encompass quantifiable sums one person owes another") (quoting *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal.4th 163, 178 (2000)). Thus, "'in the absence of a measurable loss,'" there is no basis for imposing a monetary sanction merely to achieve a deterrent effect. *Colgan*, 135 Cal.App.4th at 698 (quoting *Day*, 63 Cal.App.4th at 339); *see id.* at 699 ("restitution . . . is based on a specific amount found owing"). Because evidence of such loss was lacking – the record "contains *no* evidence concerning the amount of restitution necessary to restore purchasers to the *status quo* ante" – the Court in *Colgan* reversed the judgment for plaintiff. *Id.* at 700 (emphasis by the Court). *Accord, In re First Alliance Mortgage Co.*, 471 F.3d 977, 996-98 (9th Cir. 2006).

Each of these cases was decided based on interpretation of the remedial section of the UCL and was decided before adoption of Proposi-

tion 64 (*Kraus*, *Korea Supply*, *Cortez*, *Day*), or was decided after Proposition 64 was enacted and expressly indicated that the decision had nothing to do with Proposition 64 or the standing of the plaintiff to bring a UCL action (*Colgan*, 135 Cal.App.4th at 701 n.26; *Feitelberg*, 134 Cal.App.4th at 1010; *Madrid*, 130 Cal.App.4th at 445 n.1), or made no mention of Proposition 64 (*First Alliance*).

Nothing in *Tobacco II* is to the contrary. In the context of holding that absent class members do not have to "meet the same standing requirements as are imposed upon the class representative," the Court stated that "the language of section 17203 with respect to those entitled to restitution – 'to restore to any person in interest any money or property, real or personal, which *may have been acquired*' (italics added [by the Court]) by means of the unfair practice" is "less stringent than the standing requirement for the class representative." 46 Cal.4th at 320. Whatever this standard may mean, it surely cannot mean that a defendant must restore money to those members of the class who were *never* exposed to the alleged false ad campaign, were *not* misled by the alleged false statements (which survey evidence indisputably demonstrates is the majority of purchasers), or were brand loyal purchasers who bought before, during and after the ad campaign. Plainly, it cannot be concluded that money acquired from such purchases "may have been acquired" by the alleged false statements – that is clearly not so. It is, thus, not surprising, that the Court expressly stated

that "[o]ur conclusion with respect to the remedies set forth in section 17203 has *nothing to do* with the nonrestitutionary disgorgement disallowed in *Kraus*." *Id.* at 320 n.14 (emphasis added).

In his Supplemental Opening Brief, Galfano asserts that in *Tobacco II* the Supreme Court stated "that Proposition 64 did not overrule the Supreme Court's previous decisions 'under which restitution may be ordered without individualized proof of deception, reliance and injury if necessary to prevent the use or employment of an unfair business practice.'" (Pl. Supp. Br. p.4 (quoting 46 Cal.4th at 320)). Galfano, however, is mistaken in asserting that this statement is "contrary" to this Court's "holding" in its prior opinion in this case. (*Id.*). Thus, in support of its statement, the Supreme Court cited *Fletcher v. Security Pacific Nat'l Bank*, 23 Cal.3d 442 (1979), and "the 'may have been acquired' language" of § 17203. 46 Cal.4th at 320. Neither *Tobacco II* nor *Fletcher*, however, dispense with proof of injury as a requirement for recovery. Rather, they simply held that, on the specific facts of those cases, individualized proof was not required. That is because, where a practice is pervasive, it is reasonable to presume that money taken from the class members "may have been acquired by" the false statements or unfair practice. In *Tobacco II*, the ad campaign was decades long and pervasive. (*See* pp. 7-8, *supra*). In *Fletcher*, *every* class member, regardless of whether he or she was aware of the loan overcharge – which was independently illegal – suffered injury

because yearly interest for *everyone* was calculated on a 360-day basis. 23 Cal.3d at 454.

Here, by contrast, no presumption of class-wide injury can be made. Large numbers of class members were *never* exposed to the "as effective" labels or commercials and survey evidence shows that significantly more than half of those in the class who saw the commercials did *not* take away the allegedly implied false message. (*See* p. 19, *infra*). They cannot meet the standard of § 17203 of having money restored to them because it "may have been acquired by means of the unfair practice." In the language of the statute, with respect to well over half of the class, there is no "may" about it. We know *for a fact* that, as to them, Pfizer received *no* money by means of any UCL violation. Nowhere does *Tobacco II* or *Fletcher* state that *no* showing of injury is required to obtain monetary relief, let alone that recovery could be had where there is an affirmative showing of *no* injury.

Finally, as the California Supreme Court has explained, "[l]anguage used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." *Ginns v. Savage*, 61 Cal.2d 520, 524 n.2 (1964). The record in *Tobacco II* was uniquely compelling and far from the record here. There, the defendants had engaged in "a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use

and disease" for the express purpose of "creat[ing] and sustain[ing] addiction to their products." *Tobacco II,* 46 Cal.4th at 307.[4]

In short, *Tobacco II* was a decision limited to interpretation of the standing rules of Proposition 64. It did not in way change the well-established law that the UCL provides for non-restitutionary disgorgement in "measureable amounts" to "[a]ctual direct victims" of the unfair practice in an amount "necessary to make *injured* consumers whole." *Korea,* 29 Cal.4th at 1152; *Madrid*, 130 Cal.App.4th at 455; *Feitelberg*, 134 Cal.App.4th at 1012-13; *Colgan*, 135 Cal.App.4th at 697 (emphasis added). Confirming the narrow scope of *Tobacco II* is that, following the decision, the Court of Appeal reiterated this well established law in *Clark v. Superior Ct.*, 174 Cal.App.4th 82, 98-99 (2009) (citing *Korea Supply* and *Day*).

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[4] The uniqueness of the *Tobacco II* defendants' conduct was underscored four days after *Tobacco II*, when the United States Court of Appeals for the District of Columbia Circuit unanimously upheld a ruling finding the defendants liable for a "pattern of racketeering." That racketeering pattern "had the common purpose of obtaining cigarette proceeds by defrauding existing and potential smokers" based on "108 enumerated acts" of racketeering similar to the type of conduct that was at issue in *Tobacco II,* including overwhelming evidence of a "specific intent to defraud." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1116-21(D.C. Cir. 2009); *see id.* at 1144 ("The district court found that, for over fifty years, Defendants violated RICO by making false and fraudulent statements to consumers about their products.").

II.

APPLYING *TOBACCO II* TO THE FACTS HERE, THIS COURT CORRECTLY RULED THAT THE SUPERIOR COURT ABUSED ITS DISCRETION IN CERTIFYING A CLASS

A. The Class Definition Remains Overbroad

In contrast to the unambiguous, facially clear, demonstrably and intentionally false representations in *Tobacco II*, the allegation here is that the challenged ads and labels "creat[ed] a false *impression*" that Listerine was a substitute for floss. (EXP 048 ¶12) (emphasis added). However, the undisputed survey evidence in the record shows that, unlike in *Tobacco II*, the vast majority of consumers were *not* misled. Thus, 61% of those consumers questioned about the first of the three Listerine labels at issue (83% when the control is factored in) were *not* misled into believing that Listerine "can replace the use of floss" (EXP 703, 712), and 70% of consumers (92% when the control is factored in) did *not* take away a replacement message from the third commercial (EXP 688, 712).

Put another way, there is nothing in *Tobacco II* that would suggest that where, as alleged here, an ad is likely to deceive the public by a false implication, but where a particular plaintiff was *not* deceived and suffered *no* injury – as the survey evidence demonstrates was the case with the vast majority of consumers – restitution is "necessary to restore [*him*] to the status quo ante." *Colgan*, 135 Cal.App.4th at 700. Thus, for example, if, here, a class member who was never exposed to a label or commercial with

the alleged false statement, or did not take away from the particular label or commercial he saw the allegedly "false impression" that Listerine could be substituted for floss (EXP 048 ¶12), he was not a "victim" (direct or otherwise) "of an unfair practice," he was not "injured," he suffered no "loss," and there is no "money . . . taken [from him] or that he "had an ownership interest in" in any amount (measurable or otherwise) that is "necessary to restore [him] to the *status quo* ante." *Korea,* 29 Cal.4th at 1152; *Madrid,* 130 Cal.App.4th at 455; *Feitelberg*, 134 Cal.App.4th at 1012-13; *Colgan*, 135 Cal.App.4th at 700. Accordingly, he, and all other members of the putative class who, too, were not deceived and not injured by the challenged advertising, are not entitled to any restitution of any or all of the price they paid for Listerine. Yet, the definition here includes *all* purchasers of Listerine, and, thus, includes a significant number of purchasers – indeed, a majority based on undisputed survey evidence – who were *not* deceived and *not* injured by the challenged Listerine ads and labels.

In the previous briefing on this appeal, we demonstrated that the Superior Court abused its discretion in finding the "existence of an ascertainable class," which is a "prerequisite to class certification." *Tobacco II*, 46 Cal.4th at 318. (*See* Petition pp. 56-58, Petitioner's Response, pp. 45-47). As this Court stated in its prior opinion in this case:

> We note the class definition, extending to anyone who purchased Listerine in California within a six-month period, is overbroad . . . . For example, Pfizer's opposition papers

> showed that of 34 different Listerine mouthwash bottles, 19 never included any label that made any statement comparing Listerine mouthwash to floss. Further, even as to those flavors and sizes of Listerine mouthwash bottles on which Pfizer did place the labels which are at issue herein, not every bottle shipped between June 2004 and January 2005 bore such a label. (141 Cal.App.4th at 307 n.8 (Op. p. 19 n.8)).

Nor could the class definition be revised so it would be limited to those who saw and were injured by the challenged advertising, because individual inquiries would be required to determine who is in the class and who is not.[5] As Galfano admitted in his deposition, he could only testify as to his own experiences. He further conceded that it was only by speaking to each class member individually that the relevant facts about that member's purchase could be determined. Indeed, his attorney objected to questions as to class members' purchases – including what message, if

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[5] *See, e.g., Weaver v. Pasadena Tournament of Roses Ass'n,* 32 Cal.2d 833, 839 (1948) (certification of class of all persons wrongfully refused admission to Rose Bowl Game denied because "there is no ascertainable class" in that each person "must establish separately that he was refused admission, and that such refusal was wrongful."); *Global Minerals & Metals Corp. v. Super. Ct.,* 113 Cal.App.4th 836, 849, 858 (2003) (in determining ascertainability, court must consider "the means available for identifying class members"). *See also, e.g., Crosby v. Soc. Sec. Admin.*, 796 F.2d 576, 579-81 (1st Cir. 1986) (class of claimants "who have not had a hearing or a decision on their disability claim 'within a reasonable time'" denied certification because determination of a "reasonable time" would require "case-by-case" determination); *Adashunas v. Negley*, 626 F.2d 600, 601-04 (7th Cir. 1980) (class of children "who have learning disabilities who are not properly identified and/or who are not receiving such special instruction as to guarantee them of minimally adequate education" denied certification).

any, they took away from the challenged label – on the ground that it would be "speculation" for Galfano to do so and that the questions called for the class members' "mental processes." (EXP 750-52, 765-67, 769-70, 779-80, 801-02).

Faced with a class definition that suffers from the same defect as the one here, the Seventh Circuit affirmed denial of class certification. At issue in *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006), was the allegation that the Coca-Cola Company deceived Diet Coke consumers by failing to disclose that fountain Diet Coke, which contains a blend of the sweeteners aspartame and saccharin, and bottled Diet Coke, which is sweetened only with aspartame, are not the same product. In holding that a class defined as "all Illinois purchasers of fountain Diet Coke from March 12, 1999 forward" was both over-inclusive and too indefinite for certification, the Court explained:

> Such a class could include millions who were not deceived and thus have no grievance under the ICFA. Some people may have bought fountain Diet Coke *because* it contained saccharin, and some people may have bought fountain Diet Coke *even though* it had saccharin. Countless members of [the] putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception. (*Id.* at 514) (emphasis by the Court).

In short, the class certified by the trial court remains over-broad because it includes substantial numbers of class members who are not entitled to restitution under Section 17203. Because *Tobacco II* is, by

its own words, limited to the issue of standing of the named plaintiff, and did not change the law of restitution, the decision does not change the result that should be reached here.

B. In Addition, Galfano Does Not Have Standing to Assert Most of the Claims at Issue and, Accordingly, His Claims Are Not Typical of Those of the Class and He Is Not an Adequate Class Representative

The Court in *Tobacco II* squarely held that the named class representative must establish that he "actual[ly] relie[d]" on the alleged misrepresentation to have standing under Proposition 64. 46 Cal.4th at 326. (*See* p. 10, *supra*). Here, Galfano's own testimony demonstrates that he cannot meet this standard for any of the television commercials and for most of the labels in question. For this additional reason, the court below erred in certifying a class of all purchasers. Galfano testified unequivocally that he did *not* make his purchase based on any of the four different television ads or other ad, and that he bought Listerine due to the bottle's red label (which differed from the other labels), which he recalled said "as effective as floss," but he did not recall what else the label said. (EXP 759-61). He further stated that he never saw the blue label, which is the second label with an "as effective" claim that was on some Listerine bottles. (EXP 761, 767-68). In short, at a minimum, he did not rely on anything in the four Listerine commercials at issue – let alone testify that the alleged "misrepresentation [in the commercials] was an immediate cause of the injury-

producing conduct." *Tobacco II*, 46 Cal.4th at 326. Because each commercial and each label contained different language, with some expressly advising consumers to keep flossing, Galfano's testimony as to his reaction to the Listerine red label is not probative of his or absent class members' reaction to different language contained in television commercials and other labels. Accordingly, he has no standing to assert a UCL claim based on those commercials and other labels.[6]

Galfano's claim is, thus, at best limited to the bottle with the red label. As a result, his limited claim is not typical of the claims of those members of the class who, unlike Galfano, *did* base their purchases on the commercials or the bottles with the other three labels that were used, and, thus, unlike Galfano, could maintain, based on their individual facts, that the challenged claim in the commercials or on the bottles caused them injury. For the same reason, Galfano is not an adequate representative for those putative class members who saw and based their purchases on the claims in the commercials or on the three bottles he did not purchase or see.

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[6] In *Tobacco II*, the Supreme Court stated that "where, as here, a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements." 46 Cal.4th at 328. Given that, in contrast, the Listerine "effective as floss" campaign lasted just over six months, there is an issue as to whether Galfano's testimony that he relied on a red label that said "effective as floss" but could not recall anything else that the label stated, is sufficiently specific to establish his standing to pursue his claim.

C. The Decisions in *Kwaak* and *Elder*

Finally, we bring to the Court's attention that since its 2006 decision in this case, two appellate courts in other states have held in cases involving the same challenged commercials and labels as those at issue here that a class should not be certified. Significantly, both these state appellate courts, like California, look to Rule 23 of the Federal Rules of Civil Procedure for guidance in deciding class action motions, and both applied traditional class action principles that remain the law in California post-*Tobacco II*.

In *Kwaak v. Pfizer Inc.*, 881 N.E.2d 812 (App. Ct. Mass. 2008), the Appeals Court of Massachusetts, came to the same conclusion that this Court did in its earlier decision in this case – that the class definition was overly broad, precluding certification of a class. Indeed, it distinguished an earlier decision of the Massachusetts Supreme Judicial Court (*Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 813 N.E.2d 476 (2004)) that, like the California Supreme Court in *Tobacco II*, permitted certification of a class challenging the "light cigarette" advertising of the tobacco companies:

> In this case, there is insufficient information in the record to identify any such similarity of exposure, deception, and causation. The class certified is everyone who purchased Listerine products during the advertising campaign, regardless whether a purchaser was exposed to the campaign. Unlike in *Aspinall*, not every product was mislabeled. Some Listerine products, for example, contained no label or tag

connected to the advertising campaign. Moreover, the advertising campaign also changed substantially over time, moving, for example, from advertisements that may have improperly conveyed a floss-replacement message (the most obviously objectionable aspect of the campaign) to advertisements that expressly did not. Therefore, many of those exposed to the advertising campaign may not have been exposed to unfair or deceptive acts as defined by G. L. c. 93A [the Mass. Consumer Fraud Act]. (881 N.E.2d at 818).

The Court went on to state:

Also unclear is whether those exposed to the deceptive aspects of the advertising campaign purchased Listerine for reasons unrelated to the advertising, such as to freshen their breath or as an adjunct to flossing. Compare *Aspinall, supra at 394* (deceptive advertising of cigarettes as light, with lowered tar and nicotine, could reasonably be found to have caused smokers, interested in purchasing light, lowered tar and nicotine cigarettes, to purchase Marlboro Lights). Whether a causal connection exists between a deceptive act and a loss is not just difficult to identify but appears to vary widely depending on the customer. (*Id.*).

The Court then concluded that the class was overly broad and not certifiable:

The class proposed to be certified therefore includes some consumers with exposure and some without exposure to a variety of different advertisements, some deceptive, for at least a category of consumers, and others adequately informative for any reasonable consumer. The class would include those who purchased the product for reasons related to the deceptive aspects of the advertising and those who purchased it for reasons totally unrelated. In these circumstances, it is difficult to conclude that the class certified consists of consumers similarly situated and similarly injured by a common deceptive act or practice. (881 N.E.2d at 818).

More recently, on July 28, 2009, the Appellate Court of Illinois in *Elder* came to the same conclusion. (Ex. A). It affirmed the trial

court's denial of class certification, explaining, in words that fit this case like a glove:

> We hold that the trial court did not abuse its discretion in denying the plaintiff's motion for class certification. As the trial court correctly held, individual issues predominated over any common questions of fact or law in the plaintiff's ICFA [*i.e.*, Illinois Consumer Fraud Act] claim (815 ILCS 505/1 *et seq.* (West 2004)). Specifically, the trial court reasoned that "were this case to go forward, *** [t]his would involve individual inquiries into whether each member of the class saw, heard or read the ads in question, were deceived by them, and then suffered injury because of them." We agree and find particularly on point the trial court's statements at the hearing on the motion for class certification:
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> > THE COURT: Let's say you want a class of everybody who purchased Listerine from whatever time period that was. Well, that would conceivably include people that had always purchased Listerine products, right? So how do I know that *** anybody who purchased during this time period was somebody who only purchased because of the representations."
>
> The trial court correctly concluded that these questions could only be answered by individual inquiries, and that individual issues predominated over common questions of law or fact. (Ex. A, pp. 4-5).

III.

INTERPRETING *TOBACCO II* AND THE UCL TO PROHIBIT INQUIRY INTO WHETHER THE CHALLENGED ADVERTISING MISLED CLASS MEMBERS AND PROXIMATELY CAUSED THEM INJURY WOULD RAISE SERIOUS CONSTITUTIONAL ISSUES

It is black letter law that "[i]n ascertaining the Legislature's intent, [the court] attempt[s] to construe the statute to preserve its constitutional validity." *Korea Supply*, 29 Cal.4th 1134, 1146 (2003). This "cardi-

nal principal" of constitutional law "has for so long been applied . . . that is it beyond debate." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[7] Particularly where, as here, serious First Amendment issues are raised, courts not only "have the power," but the "*duty* to avoid constitutional difficulties" by adopting a narrowing construction of a statute "if such a construction is fairly possible." *Boos v. Barry*, 485 U.S. 312, 330-31 (1988) (emphasis added). *Accord*, *Frye v. Tenderloin Housing Clinic, Inc.*, 38 Cal.4th 23, 42-43 (2006) (interpreting statute to avoid "First Amendment questions").

Here, as demonstrated below, there is, at a minimum, serious doubt whether the UCL would pass muster under the free speech and due process clauses of both the Federal and State Constitutions if it were interpreted to (1) permit recovery by class members who were not exposed to or misled by the challenged Listerine advertising or (2) bar Pfizer from cross-examining class members or to present evidence that they were not exposed

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[7] *See also Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) ("the canon of constitutional avoidance 'is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts") (quoting *Clark v. Martinez*, 543 U.S. 371, 381 (2005)); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("'[I]t is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

to or misled by, or did not suffer any injury proximately caused by, the challenged advertising.

A. Interpretation of *Tobacco II* and the UCL to Permit Monetary Recovery to Class Members Who Were Not Misled Would Violate Pfizer's Federal and State Constitutional Right to Free Speech

Interpreting *Tobacco II* and the UCL to permit a class member to recover a monetary award where he or she was not exposed to or deceived by the challenged Listerine advertising would raise serious questions under the First Amendment and the "even 'broader and 'greater'" free speech guarantee in this State's Constitution. *Gerawan Farming, Inc. v. Lyons,* 24 Cal.4th 468, 491 (2000). In particular, under such an interpretation, everyone in the class would obtain restitution even though the labels on 19 out of 34 bottles did not contain the alleged false statement, and, based on the survey, only 39% of those exposed to the first of the three Listerine labels (17% when the control is factored in) in a survey were misled. Simply put, it is antithetical to the First Amendment to penalize someone for providing non-misleading information. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (advertisers "have an interest in conveying non-misleading information about their products to adults, and adults have a corresponding interest in receiving truthful information about . . . products"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (a state may regulate commercial

speech, but "may not do so by keeping the public in ignorance" of the truth); *Garrison v. La.*, 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."); *Gerawan*, 24 Cal.4th at 494 ("[A]rticle I's right to freedom of speech protects commercial speech, at least in the form of truthful and non-misleading messages about lawful products").[8]

B. Interpretation of *Tobacco II* and the UCL to Permit Monetary Recovery to Class Members Without Pfizer Having the Ability to Cross-Examine Them and to Present Evidence that They Were Not Exposed to the Alleged False Statement or Were Not Misled and Suffered No Injury Proximately Caused by Violation of the UCL Would Violate Pfizer's Federal and State Constitutional Right to Due Process

It would also violate Pfizer's federal and state due process rights if *Tobacco II* were interpreted to permit monetary recovery under the UCL if Pfizer were not permitted to cross-examine each class member and to present evidence as to that class member to determine, *inter alia*, if that person had been exposed to the Listerine commercials or labels at issue

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[8] We note that under the federal Lanham Act, 15 U.S.C. § 1125(a), a competitor who succeeds on a trademark infringement or false advertising claim is entitled not to 100% of the defendant's profits, but only to that percentage equal to the percentage of persons whom the challenged ad misled. *See, e.g., Plasticolor Molded Products v. Ford Motor Co.*, 713 F. Supp. 1329, 1349-50 (C.D. Cal. 1989), *vacated by settlement*, 767 F. Supp. 1036 (C.D. Cal. 1991); *Burndy Corp. v. Teledyne Indus., Inc.*, 748 F.2d 767, 771 (2d Cir. 1984) ("a plaintiff who establishes false advertising in violation of §43(a) of the Lanham Act will be entitled only to such damages as were caused by the violation").

and, if so, which commercial or label he or she saw; whether he or she was misled by the commercial or label; and whether he or she suffered injury proximately caused by the misleading message the he or she received from the commercial or label. As the Texas Supreme Court explained in reversing class certification, "basic to the right to a fair trial – indeed, basic to the very essence of the adversarial process – is that each party have the opportunity to adequately and vigorously present any material claims and defenses." *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 437-38 (Tex. 2000).

These basic principles are enshrined both in state and federal law. As the California Court of Appeal recently reiterated, "'[i]t is a cardinal principle of our jurisprudence that a party should not be bound or concluded by a judgment unless he has had his day in court. This means that a party must be . . . afforded *an opportunity to be heard and to offer evidence at such hearing in support of his contentions*.'" *In re Marriage of Carlsson*, 163 Cal.App.4th 281, 284 (2008) (quoting *Spector v. Superior Ct.*, 55 Cal.2d 839, 843 (1961) (emphasis added). "Among the essential ingredients of due process are . . . the right to confront and cross-examine witnesses." *In re Patricia T*, 91 Cal.App.4th 400, 404 (2001). *Accord, In re James Q*, 81 Cal.App.4th 255, 263 (2000) ("[P]arties in civil proceedings have a due process right to cross-examine and confront witnesses.").

Similarly, the U.S. Supreme Court has stated that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *id.* at 266 (holding such opportunity required even where, unlike here, the party is not entitled to a "judicial or quasi-judicial trial").[9] Indeed, several federal courts have recognized that it would violate the defendant's due process rights to try a case on the basis of class-wide proof when claims and defenses are individualized.[10]

At the end of the day, any argument that *Tobacco II* and the UCL should be interpreted to permit monetary recovery under the UCL without Pfizer being permitted to cross-examine each class member and to

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[9] *See also, e.g., San Diego Unified School Dist. v. Comm'n on State Mandates,* 33 Cal.4th 859, 879 (2004) ("[A]n opportunity to call and cross-examine witnesses and to present evidence" is a "basic federal due process requirement"); *McCullough v. Terzian*, 2 Cal.3d 647, 655 (1970) ("An opportunity to present evidence and to confront and cross-examine witnesses is, of course, required"); *In re Matthew P.*, 71 Cal.App.4th 841, 849 (1999) ("due process" includes the "right . . . to confront and cross-examine witnesses").

[10] *See, e.g., W. Elec. Co. v Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) ("[T]o deny Western the right to present a full defense on the issues would violate due process . . . . [D]defendants must be allowed to present any relevant rebuttal evidence they choose, including evidence that there was no discrimination against one or more members of the class"); *In re Fibreboard Corp.*, 893 F.2d 706, 710 (5th Cir. 1990); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 487-89 & n.21 (E.D. Pa. 1997); *In re Masonite Corp. v. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997).

present evidence as to that class member's claim boils down to the argument that it would be easier for a class to be certified, and defendants held liable, if it could simply be assumed that the facts as to the plaintiff are the same as the facts as to everyone else in the class. Such an all or nothing single trial, at which Pfizer would be denied the right to cross-examine and present evidence in connection with particular purchases by particular class members, would violate Pfizer's due process rights. It would also violate the rights of other members of the class who would be stuck with the facts as to Galfano's claim even if the facts as to their claims were more favorable – a circumstance that is clearly present here given that Galfano testified that he did not base his purchase decision on any of the challenged Listerine commercials.

If due process means anything, it is that "[t]he benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). As the U.S. Supreme Court has explained:

> Procedural due process is not intended to promote efficiency . . . it is intended to protect the particular interests of the person whose possessions are about to be taken . . . . "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

Fuentes v. Shevin, 407 U.S. 67, 91 n.22 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)). *See In re Gen'l Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1133 (7th Cir. 1979) ("convenience and expediency cannot justify disregard of the individual rights of even a fraction of the class").[11]

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[11] *See also Melendez-Diaz v. Mass.*, 129 S. Ct. 2527, 2540 (2009) ("[R]espondent asks us to relax the requirements of the Confrontation Clause to accommodate the 'necessities of trial and the adversary process.' It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause – like those other constitutional provisions – is binding, and we may not disregard it at our convenience.") (citation omitted).

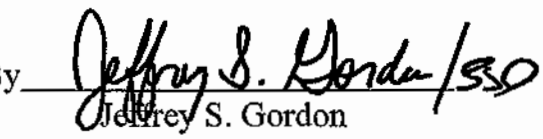
CONCLUSION

For the foregoing reasons, the Court should issue a writ of mandate and vacate the Respondent Court's November 22, 2005 Order certifying a class.

Dated: September 18, 2009

Respectfully submitted,

KAYE SCHOLER LLP

By 
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CERTIFICATION

I, Jeffrey S. Gordon, an attorney at law duly admitted to practice before all the courts of the State of California and am a member of the law firm of Kaye Scholer LLP, attorneys of record herein for petitioner and defendant Pfizer Inc., hereby certify that this document (including the 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)(1) in that it is set in a proportionally spaced 13-point typeface and contains 7,801 words as calculated using the word count function of Word.

By: Jeffrey S. Gordon /BD
Jeffrey S. Gordon

Exhibit A

corrected copy

SECOND DIVISION
JULY 28, 2009

1-08-1423

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT K. ELDER, individually and on behalf of all other similarly situated, Plaintiff-Appellant, v. PFIZER, INC., a Delaware corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 05 CH 00633 Honorable Nancy J. Arnold, Judge Presiding.

ORDER

Between June 2004 and January 2005, the defendant, Pfizer, Inc., engaged in a nationwide marketing campaign to promote one of its products, Listerine Antiseptic Mouthwash (Listerine), during which it produced various television commercials, print advertisements and product labeling. The advertisements claimed that Listerine was "clinically proven to be as effective as floss against plaque and gingivitis between teeth." Allegedly, the plaintiff, Robert Elder, upon seeing these advertisements produced by the defendant, stopped using his usual brand of Scope mouthwash (Scope), flossed less frequently, and began purchasing and using Listerine based on his belief that it was just as effective as flossing. He allegedly stopped using Listerine and returned to his old flossing routine and to using Scope when he learned that the defendant's claims about Listerine were false.[1]

[1]McNeil-PPC, a competitor of the defendant, successfully obtained preliminary injunction in federal district court against the defendant regarding the Listerine advertisements. The district court held that "[the defendant's] implicit message that Listerine can replace floss is false and

On January 11, 2005, the plaintiff filed a three-count[2] class action complaint in the circuit court of Cook County, alleging that the defendant's "as effective as floss" advertising was deceptive, unfair and misleading.

On June 14, 2005, the plaintiff filed a motion for class certification, requesting that the trial court certify the action as a nationwide class action and designate the plaintiff as class representative. On November 29, 2005, a hearing on the motion for class certification was held. Subsequently, on February 17, 2006, the trial court denied the motion for class certification, finding that the plaintiff failed to prove the elements necessary for class certification, and that the plaintiff has not sufficiently alleged a valid Illinois Consumer Fraud and Deceptive Business Practices Act claim. Thereafter, the plaintiff petitioned this court on appeal, pursuant to Supreme Court Rule 306 (210 Ill. 2d R. 306(a)(8)), and later also petitioned our supreme court to review the trial court's ruling on the motion for class certification. Both petitions were denied. See Elder v. Pfizer, Inc., 222 Ill. 2d 570, 861 N.E.2d 654 (2006).

The action was then transferred to the first municipal district in the circuit court of Cook County, where the case was assigned to mandatory arbitration. At the arbitration hearing, the plaintiff, individually, was awarded $1,000 in punitive damages and $18 in actual damages. The

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misleading." 351 F. Supp. 2d 226, 256 (S.D.N.Y. 2005).

[2]Count I of the complaint alleged unfair and deceptive conduct under the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) (815 ILCS 505/1 *et seq.* (West 2004)). Count II of the complaint alleged that the defendant was unjustly enriched, based on its false advertising campaign. Count III of the complaint alleged a breach of warranty under the Magnuson-Moss Warranty Act (15 USCA § 2301 *et seq.* (West 2004)).

defendant tendered a check in the full amount of the award to the plaintiff, who neither rejected nor deposited the check. On April 18, 2008, judgment against the defendant was entered in the amount of $1,018, with no fees or costs of litigation awarded.

On May 19, 2008, the plaintiff filed a notice of appeal before this court, requesting that the trial court's February 17, 2006 order denying class certification be reversed and the cause be remanded to the trial court for further proceedings. On appeal, the plaintiff argues that (1) the trial court erred in holding that individual issues predominated over common issues; (2) the trial court erred in finding that the plaintiff did not properly allege actual damages suffered; and (3) this court has jurisdiction over this appeal because the plaintiff's arbitration award on his individual claims did not render the class action moot.

We note that the plaintiff does not appeal the April 18, 2008 final judgment of arbitration award entered against the defendant in the amount of $1,018 . Rather, he is appealing the trial court's February 17, 2006 order denying his motion for class certification. We have jurisdiction over this appeal because the tender of the arbitration award to the plaintiff did not deprive the plaintiff of standing as a putative class representative or moot his or the putative class members' claims. See Gaston v. Founders Insurance Co., 365 Ill. App. 3d 303, 311, 847 N.E.2d 523, 530-31 (2006), citing Deposit Guaranty National Bank, Jackson, Mississippi v. Roper, 445 U.S. 326, 332-36, 63 L. Ed. 2d 427, 100 S. Ct. 1166, 1170-73 (1980) (holding that entry of judgment in the plaintiff's favor did not moot his right to appeal an adverse class certification ruling because the plaintiff retained a "continuing individual interest in the resolution of the class certification question in his desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and

ultimately prevails"). Thus, we review the trial court's denial of the motion for class certification.

The denial of a motion for class certification is reviewed under an abuse of discretion standard. Health Cost Controls v. Sevilla, 365 Ill. App. 3d 795, 805, 850 N.E.2d 851, 860 (2006). "In reviewing a circuit court's denial of class certification, a reviewing court is only to assess the discretion exercised by the trial court and may not instead assess the facts of the case and conclude for itself that a case is well-suited for a class action." Sevilla, 365 Ill. App. 3d at 805, 850 N.E.2d at 861.

Section 2-801 of the Illinois Code of Civil Procedure states that an action may be maintained as a class action only if:

> "(1) [t]he class is so numerous that joinder of all members is impracticable[;]
>
> (2) [t]here are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members[;]
>
> (3) [t]he representative parties will fairly and adequately protect the interest of the class[;]
>
> (4) [t]he class action is an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801 (West 2006).

We hold that the trial court did not abuse its discretion in denying the plaintiff's motion for class certification. As the trial court correctly held, individual issues predominated over any common

questions of fact or law in the plaintiff's ICFA claim (815 ILCS 505/1 *et seq.* (West 2004)). Specifically, the trial court reasoned that "were this case to go forward, *** [t]his would involve individual inquiries into whether each member of the class saw, heard or read the ads in question, were deceived by them, and then suffered injury because of them." We agree and find particularly on point the trial court's statements at the hearing on the motion for class certification:

> "THE COURT: Let's say you want a class of everybody who purchased Listerine from whatever time period that was. Well, that would conceivably include people that had always purchased Listerine products, right? So how do I know that *** anybody who purchased during this time period was somebody who only purchased because of the representations."

The trial court correctly concluded that these questions could only be answered by individual inquiries, and that individual issues predominated over common questions of law or fact. We also agree with the trial court that the plaintiff was not an adequate class representative because he failed to show actual damages recoverable under ICFA (815 ILCS 505/1 *et seq.* (West 2004)) and thus, did not allege a valid claim against the defendant under ICFA. See Avery v. State Farm Mutual Automobile Insurance Co., 216 Ill. 2d 100, 195-96, 835 N.E.2d 801, 858-59 (2005).

Similarly, the trial court found that the plaintiff failed to meet his burden in showing that common questions of law or fact predominated in his remaining claims for unjust enrichment and breach of warranty under the Magnuson-Moss Warranty Act (15 USCA § 2301 *et seq.* (West 2004)). The trial court held that for the Magnuson-Moss Warranty Act claim, "individual questions would

predominate over any common warranty questions; namely, the extent of each [putative class] member's reliance on the alleged warrant and whether it became the 'basis of the bargain.' " See 15 U.S.C.A. § 2301(6) (West 2004). Likewise, it held that individual inquires would be needed in order to make a finding that the plaintiff had suffered a detriment under the unjust enrichment claim. Such individual inquiries "as to the reasons each [putative class] member purchased Listerine and whether these purchases caused each member detriment" predominated over any common questions of law or fact.

Accordingly, because the plaintiff failed to show that all four prerequisites for class certification were met under section 2-801 (735 ILCS 5/2-801 (West 2006)), we hold that the trial court did not abuse its discretion in denying the plaintiff's motion for class certification.

Affirmed.

CUNNINGHAM, J., with KARNEZIS, P.J., and HOFFMAN, J., concurring.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1999 Avenue of the Stars, Suite 1700, Los Angeles, California 90067.

OnSeptember 18, 2009, I served the documents described as **PETITIONER'S SUPPLEMENTAL OPENING BRIEF** by placing a true copy of the above-entitled document in a sealed envelope addressed as follows:

See Attached Service List

☐ by **E-MAIL**

☐ by **FACSIMILE**

☒ by **U.S. MAIL** (I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.)

☐ by **FEDERAL EXPRESS** (by causing such envelope to be delivered to the office of the addressee by overnight delivery via Federal Express or by other similar overnight delivery service).

☐ by **PERSONAL SERVICE**

☐ by personally delivering such envelope to the addressee.
☐ by causing such envelope to be delivered by messenger to the office of the addressee.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed onSeptember 18, 2009, at Los Angeles, California.

Vickie J. Huntley
Name

Signature

23273689.DOC

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Ronald A. Reiter Supervising Deputy Attorney General Kathrin Elizabeth Sears Office of the Attorney General Consumer Law Section 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102	On Behalf of the **ATTORNEY GENERAL AS AMICUS CURIAE** **VIA UNITED STATES MAIL**
The Honorable Carl J. West Superior Court of the State of California, County of Los Angeles Central Civil West, Courtroom 311 600 S. Commonwealth Avenue Los Angeles, CA 90005	**VIA UNITED STATES MAIL**
Los Angeles County District Attorney Clara Shortridge Foltz Criminal Justice Center 210 W. Temple Street, 18th Floor Los Angeles, CA 90012	On Behalf of **THE PEOPLE AS AMICUS CURIAE** **VIA UNITED STATES MAIL**
Supreme Court of California Ronald Regan Building 300 S. Spring Street, 2nd Floor Los Angeles, CA 90013	**Four Copies** **VIA UNITED STATES MAIL**