IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PFIZER INC., **Petitioner,** **v.** **THE SUPERIOR COURT OF LOS ANGELES COUNTY,** **Respondent;** **STEVE GALFANO,** **Real Party in Interest.**	B188106 Los Angeles Superior Court Case No. BC327114

BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE

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INTRODUCTION

This appeal raises important questions about class action requirements applicable to a case brought under the unfair competition law ("UCL") (Business and Professions Code section 17200 et seq.) following the adoption of Proposition 64. Plaintiff Galfano filed a UCL action against petitioner-defendant Pfizer Inc. ("Pfizer"), alleging that it deceptively advertised that use of Listerine mouthwash is as effective as dental flossing. In challenging the trial court's decision to certify the case to proceed as a class action, Pfizer seeks to extend the standing requirement of Proposition 64 to each and every member of the putative class, and in so doing to alter the burden of proof in UCL actions and the prerequisites for class certification.

Pursuant to Proposition 64, to bring a cause of action under the UCL, a plaintiff must have suffered injury in fact and lost money or property as a result of the alleged statutory violation. A person may pursue a representative claim on behalf of others only if the person meets the UCL's standing requirement and complies with the class action requirements of Code of Civil Procedure section 382.

Proposition 64 was drafted to ensure that the person bringing a UCL action had actually suffered some loss in order to demonstrate the plaintiff's direct interest in the case and address litigation abuses. Proposition 64, thus, was designed to qualify the particular plaintiff as a person directly affected by the alleged violations and, consequently, as someone directly interested in the outcome of the action. Proposition 64, however, did not alter existing substantive UCL law and remedies. UCL case law is clear that damage and reliance are not elements of a UCL cause of action, and restitution can be awarded to all consumers solicited by deceptive advertising without individualized proof of their knowledge and reliance on the deceptive advertising. The question presented by this case is how to reconcile the standing requirements of Proposition 64 with the substantive UCL law.

Construing Proposition 64 to require that each class member demonstrate actual deception, reliance and/or causation, and damage, as Pfizer proposes, would abrogate established UCL liability standards and essentially convert a UCL cause of action into a claim akin to common law fraud. Pfizer's construction of Proposition 64 also would revise class action standards by requiring individualized proof of damages as a prerequisite to class certification. Particularly in deceptive advertising cases, this alteration of liability and class action standards would eviscerate private enforcement of the UCL through representative actions. Neither the language nor the intent of Proposition 64 supports such sweeping revision of established UCL law.

INTEREST OF THE ATTORNEY GENERAL AS AMICUS CURIAE

The Attorney General is the chief law officer of this State (Cal. Const., art. V, § 13) and has broad statutory and common law powers that may be invoked to protect the public interest. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) The Attorney General and other prosecutorial agencies are specifically authorized under the UCL to bring actions in the name of the People of the State of California to obtain injunctive and other equitable relief, restitution, and civil penalties to redress unfair, unlawful, and fraudulent business practices and deceptive advertising, including violations of Section 17200 and 17500.[1] (See Bus. & Prof. Code, §§ 17203, 17204, 17206, 17535, 17536.) Our Supreme Court has characterized actions brought by the Attorney General under these sections as civil law enforcement actions. (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17.) Private parties may also bring representative claims on behalf of others for injunctive and other equitable relief but not civil penalties. (Bus. & Prof. Code, §§ 17203, 17535.)

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[1]Unless otherwise noted, all references in the Attorney General's Amicus Brief to code sections are to the Business and Professions Code.

An appeal in a private action involving the UCL, such as the appeal in this case, may have profound ramifications for law enforcement agencies which regularly rely on the UCL for combating a host of unfair, deceptive, and unlawful practices. Accordingly, appellants are required to serve the Attorney General with copies of their briefs in matters involving the UCL. (See Bus. & Prof. Code, §§ 17209, 17536.5; Cal. Rules of Court, rule 44.5.) The Attorney General may then determine to file a brief as amicus curiae to present the public law enforcement perspective. (See Cal. Rules of Court, rule 13(c)(6) [permitting Attorney General to file brief as amicus curiae without obtaining prior leave of court].)

The Attorney General has a significant interest in the question of how to reconcile the standing requirements of Proposition 64 with the substantive UCL law and in ensuring that this State's consumer protection statutes are properly construed and applied. The outcome of this case may affect the enforcement of the statutes in question by law enforcement agencies. Accordingly, the Attorney General respectfully appears as amicus curiae under Rule 13(c)(6), California Rules of Court.

ARGUMENT

I. PROPOSITION 64 AND THE SCOPE OF THE STANDING REQUIREMENT

In 2002 and 2003, the Trevor Law Group achieved infamy in California by abusing the UCL. As one court described it:

> The abuse is a kind of legal shakedown scheme: Attorneys form a front "watchdog" or "consumer" organization. They scour public records on the Internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of the front organization. Since even frivolous lawsuits can have economic nuisance value, the attorneys then contact the business (often owned by immigrants for whom English is a second language), and point out that a quick settlement (usually around a few thousand dollars) would be in the business's long-term interest.

(*People ex rel. Bill Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1316-17.)

Proposition 64 was intended to curtail abuse of the UCL by private attorneys such as the Trevor Law Group and others who "file frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit." (Prop. 64, §1 subd. (b).) As indicated on the face of the initiative, the intent of the voters in enacting Proposition 64 was "to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution."[2] (*Id.* §1, subd. (e); see also Proposition 64 Ballot Measure Summary, Arguments Pro ["Proposition 64 closes a loophole allowing lawyers to file frivolous shakedown lawsuits against small businesses."].)

To address such abuses, Proposition 64 amended Business and Professions Code section 17203 to add the following language:

> 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, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

(Prop. 64, § 2.)[3] Section 17204, in turn, was amended to provide that an action for relief under the UCL shall be prosecuted "by any person who has suffered injury in fact and

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[2]To establish a case or controversy under federal law, a plaintiff must have suffered an "'injury in fact'" that is "concrete," "particularized," and "'actual or imminent, not "conjectural" or "hypothetical"'." (*Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351, 364; see also *People v. Morris* (2003) 107 Cal.App.4th 402, 131 Cal.Rptr.2d 872 ["The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute...."].)

[3]Proposition 64 also amended section 17535 to add identical language at the end of the second paragraph therein. (Prop. 64, § 5.)

has lost money or property as a result of such unfair competition." (*Id.* § 3.) The plain language of Proposition 64 precludes extension of the standing requirement set forth in section 17204 to anyone other than the named plaintiff pursuing representative claims or relief on behalf of others pursuant to section 17203.

Statutory language enacted by an initiative measure is construed under the same principles of construction applicable to statutes enacted by the Legislature. (*Farmers Insurance Exchange v. Superior Court* (2006) 137 Cal.App.4th 842.) The task is "to ascertain the intent of the electorate so as to effectuate the purpose of the law." (*Id.*) "If the language of the statute is unambiguous, the plain meaning governs." (*Korea Supply Co.* v. *Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1146 (*Korea Supply*).) "A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.]" (*Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1386-87.)

The language of Proposition 64 is unambiguous. The phrase in section 17203, "Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204," plainly refers to the person bringing representative claims on behalf of others. It is axiomatic that claims are brought by the named plaintiff in a representative action. And it is the named plaintiff who must have standing. Cases cited by Pfizer make this very point. (See, *e.g.*, *Simon v. Eastern Ky. Welfare Rights Or.* (1976) 426 U.S. 26, 40 fn. 20 (*Simon*) ["That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong

and which they purport to represent." [Citation.]"); *Lewis v. Casey* (1995) 528 U.S. 343, 357 [same].)

"The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a ... court, and not [on] the issues he wishes to have adjudicated. [Citation.] A party enjoys standing to bring his complaint into court if his stake in the resolution of that complaint assumes the proportions necessary to ensure that he will vigorously present his case. [Citation.] As Professor Jaffe has stated, we must determine standing by a measure of the 'intensity of the plaintiff's claim to justice.' [Citation.]'" (*Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 159; see also *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 60.) Thus, a standing requirement is a means to ensure that the plaintiff will actively pursue the action because he has a stake in the outcome -- the very antidote that Proposition 64 utilized to combat the filing of meritless UCL claims by shadow plaintiffs fronting for attorneys in legal shakedown schemes against small businesses, in particular.

Section 17203, as amended by Proposition 64, therefore provides that the person pursuing claims or relief on behalf of others in a representative action (i.e. the named plaintiff) must (1) have suffered injury in fact and lost money or property as a result of the alleged unfair competition (pursuant to the standing requirements of section 17204), and (2) comply with section 382 of the Code of Civil Procedure. (*Consumers Union of United States, Inc. v. Fisher Development, Inc.* (1989) 208 Cal.App.3d 1433, 1439 ["Nor is an action on behalf of the general public, prosecuted by a private attorney general, to be confused with a class action, wherein damage to the *representative plaintiff* is required." (emphasis added)].)

There can be no question that section 17203 is directed at the person bringing the claim, and not to individual class members. Pfizer focuses on the "standing" language added to section 17204, and applies it to all persons regardless of whether they are individual plaintiffs or class members. But representative actions are addressed in

section 17203, and not in section 17204. Pfizer cannot simply ignore the language of section 17203, which clearly applies the standing requirement of section 17204 only to the person pursuing representative claims on behalf of others, i.e. the named plaintiff.

Although Proposition 64 expressly makes the person bringing a representative action subject to the standing requirement set forth in section 17204, and specifically refers to Section 382, which governs class actions, it makes no mention of class members. Section 17203 does refer to actions brought by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state. Pursuant to Proposition 64, these public prosecutors may continue to bring actions on behalf of the public without meeting the standing requirement or complying with the statutory class action requirements; they also can obtain penalties not available in a private representative action. Pfizer misapplies the principle *expressio unius est exclusio alterius* (the expression of some things in a statute necessarily means the exclusion of other things not expressed) in suggesting that because class members are not included as part of this list of public prosecutors, they are not exempt from the standing requirement. (Petition at p. 32.) Class members, of course, do not prosecute claims at all so it is not surprising they are not included in the list of prosecutors.

If Proposition 64 intended to make each and every class member subject to the standing requirement, it would have said so; it did not. Pfizer argues that it would be anomalous to require a person asserting an individual claim under the UCL to meet the standing requirement but not to place the same requirement on class members who are not named plaintiffs. But that is exactly the situation with respect to Article III standing and class actions brought under Rule 23 of the Federal Rules of Civil Procedure. (See *In re Leapfrog Enterprises Inc. Securities Litigation* (N.D.Cal. Jan. 27, 2006, No. C-03-

05421 RMW, Slip Copy) 2005 WL 3801587; *Simon, supra*, 426 U.S. at p. 40 fn 20.)[4]

Proposition 64 makes clear that it was specifically intended to address the filing of frivolous lawsuits by importing a standing requirement into section 17203 so that the individual filing suit on behalf of others has a stake in the outcome and is not a cipher for a disreputable attorney pursuing a shakedown scheme. There is no basis to extend this standing requirement to every class member.

II. THE STANDING REQUIREMENT OF PROPOSITION 64 DOES NOT ALTER SUBSTANTIVE UCL LAW AND REMEDIES

That Proposition 64 added a standing requirement for a private plaintiff in a representative action is undisputed. But the addition of a standing requirement does not change liability standards under section 17200 or 17500 (the false advertising law), as Pfizer attempts to suggest.[5] Standing and liability, of course, are separate legal concepts. (*Korea Supply, supra,* at p. 1151 [distinguishing between the UCL's "liberal standing requirements" and "relaxed liability standards"].) The language in section 17203, as amended by Proposition 64, which states that a person pursuing representative claims or relief on behalf of others must meet "the *standing requirements* of Section 17204," unambiguously addresses standing, not liability.

Here, if plaintiff Galfano failed to allege that he has suffered injury in fact and lost money or property as a result of the allegedly deceptive advertising campaign, as Pfizer suggests at page 9 of its Response, then Pfizer may argue that Galfano is not a proper

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[4]Pfizer misrepresents *Laster v. T-Mobile USA, Inc.* (S.D.Cal. 2005) 407 F.Supp.2d 1181 by omitting the italicized language from its quotation of the following statement at page 11 of the Response: "The language of the UCL, as amended by Proposition 64, makes clear that a showing of causation is required *as to each representative plaintiff*." The full text of the statement, of course, affirms that Proposition 64 created a standing requirement for the representative plaintiff only, and not for each class member.

[5]It also does not alter the nature of the relief available in a UCL action, a claim Petitioner, unsurprisingly, does not make.

class representative. Indeed, the Respondent Court expressly retained jurisdiction to order the class to replace plaintiff Galfano with a new class representative, if appropriate. [EXP 00014-15.] But the standing requirement does not provide a basis to change liability standards applicable to UCL claims, which is what Pfizer advocates by asserting that "to succeed *each* class member must have been deceived and the deception must have caused him injury." (Petition at p. 37.) Proposition 64, in fact, left unchanged the language in the UCL that forms the basis of the well-established liability standards applicable to such claims.

A. A Deceptive Advertising Charge May Be Established By Showing That The Advertisement Had The Capacity or Tendency To Mislead Or Confuse The Public

Proposition 64 made no revision to Business and Professions Code section 17200, which states: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." The definition of unfair competition thus establishes three alternative prohibitions -- against a business practice or act or advertising that is *unlawful*, or *unfair*, or *deceptive*. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647 [the test for determining a violation of the unfair competition laws is a disjunctive one.].) The "unfair competition statutes have always been framed in 'broad, sweeping language precisely to enable judicial tribunals to deal with the innumerable "'new schemes which the fertility of man's invention would contrive.'" (*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 284 (*Progressive West*).)

Proposition 64 also made no revision to Business and Professions Code section 17500, which "has been broadly construed to proscribe '"not only advertising which is

and false or misleading commercial speech is not entitled to First Amendment protection in any event. (*Kasky, supra,* 27 Cal.4th at pp. 953-54, 964 ; *People v. Columbia Research Corp.* (1977) 71 Cal.App.3d 607, 614.)

Based on these established principles, it would not be necessary in this case, as Pfizer asserts, for the trial court to determine which advertisements or bottle labels actually were relied upon by purchasers of Listerine during Pfizer's "effective as flossing" campaign, or to examine whether individual class members actually were deceived, in order to determine liability. Indeed, actual deception or confusion, reasonable reliance and damage are not elements of an action based on false or misleading advertising or deceptive business practice. (*Committee on Children's Television, supra,* 35 Cal.3d at p. 211; *People v. Dollar Rent-A-Car Systems, Inc.* (1989) 211 Cal.App.3d 119, 129; see also *Prata, supra*, 91 Cal.App.4th at p. 1144 ["The trial court used the wrong standard in focusing on issues of proof regarding individual consumers."].) The violation occurs when a product is marketed in a deceptive manner and the evidence is the advertising itself. As the California Supreme Court has explained:

> we have consistently condemned not only those alleged unfair practices which have in fact deceived the victims, but also those which are likely to deceive them. [Citations.] We do not deter indulgence in fraudulent practices if we permit wrongdoers to retain the considerable benefits of their unlawful conduct.... Thus a class action must proceed, in the absence of individualized proof of lack of knowledge of the fraud, as an effective means to accomplish this disgorgement.

(*Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 451 (*Fletcher*).)

This liability standard has been in place for more than 25 years. "[S]ince *Fletcher* was decided, our courts have not departed in any manner from the principle that liability for restitution under either the specific false advertising provisions of Business and Professions Code section 17500 or the broader provisions of the UCL may be found without any individualized proof of deception and solely on the basis [that] a defendant's

conduct was likely to deceive consumers." (*Mass. Mutual Life Ins. Co.* v. *Superior Court* (2002) 97 Cal.App.4th 1282, 1289 (*Mass. Mutual*).)

Courts continue to apply these very same standards post-Proposition 64. (See, *e.g.*, *Progressive West, supra*, 135 Cal.App.4th at p. 284 ["A fraudulent business practice under section 17200 'is not based upon proof of the common law tort of deceit or deception, but is instead premised on whether the public is likely to be deceived.'"]; *Bell* v. *Blue Cross of California* (2005) 131 Cal.App.4th 211, 221 (*Bell*) ["We likewise reject Blue Cross's contention that Dr. Bell has failed to state a cause of action under the UCL, where the issue is whether Dr. Bell's first amended complaint alleges that Blue Cross engaged in a business practice likely to deceive the reasonable person to whom the practice was directed, and not whether there was actual deception."]; *Colgan, supra,* 135 Cal.App.4th at pp. 679, 682 ["Section 17500 has been broadly construed to proscribe "'not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.'" [Citation.]."];[6] *Blakemore* v. *Superior Court* (2005) 129 Cal.App.4th 36, 49 (*Blakemore*) ["Unlike common law fraud, a section 17200 violation can be shown even without allegations of actual deception, reasonable reliance and damage."].)

Pfizer admits that "whether the ad is 'likely to deceive the reasonable person to whom the [ad] is directed' (*Bell*, 131 Cal.App.4th at p. 221), is the standard for determining whether the ad violates the prohibitions in §17200 and §17500 and, thus is

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[6]Pfizer misrepresents *Colgan* in stating that the court did not address "the issue of Proposition 64's application." (Response at p.12.) What the *Colgan* court, in fact, said was: "Sections 17203, 17204, and 17535 were amended by Initiative Measure Proposition 64 ... to limit standing in actions for injunctive relief.... The issue of whether the amendments enacted by Proposition 64 apply retroactively is currently pending before the California Supreme Court. [Citation.] We need not determine whether those amendments have retroactive effect in this case because Leatherman does not challenge plaintiffs' standing under the applicable rules." (*Colgan, supra* , 135 Cal.App.4th at p. 701, fn. 26.)

enjoinable either in a private action or in an action by the Attorney General." (Response at p. 13.) Pfizer contends, however, that as a result of Proposition 64, to bring a representative action under the UCL each class member must show the actual deception and reasonable reliance elements of common law fraud.[7] (Petition at p. 41 ["Even assuming that an individual inquiry showed that the member read an ad and was misled by it and that the alleged deception caused him to purchase Listerine, *each* member must also prove that the advertising claim was false *as to him*."]; Response at pp. 14-15 ["where an ad is likely to deceive the public, but a particular plaintiff was not deceived and thus suffered no injury," there is no basis to award restitution].)

Neither the language nor the intent of Proposition 64 suggests that the addition of a standing requirement was meant to dramatically alter substantive rights under the UCL by turning it into a variant of common law fraud. Instead, the UCL provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. (*Korea Supply, supra,* 29 Cal.4th 1134.) "A construction of these statutes that reduced them to common law fraud would not only be redundant, but would eviscerate any purpose that the UCL and the [False Advertising Law] have independent of common law fraud." (*Anunziato v. eMachines, Inc.* (C.D.Cal. 2005) 402 F.Supp.2d 1133, 1138

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[7]Although Pfizer contends that Proposition 64 introduced a "causation" requirement but not a "reliance" requirement into the UCL, its attempt to distinguish reliance and causation flounders. Pfizer states that a consumer "would not have to show that he purchased the product because of the [false or misleading] claim, i.e. that he relied on the claim in making his purchasing decision. He would, however, have to show that he read and was deceived by the claim, even though he may have bought the product for an unrelated reason. To show injury, he would have to show that the falsity of the claim proximately caused him injury." (Response at p. 9.) This statement incorporates actual deception and reliance, elements of common law fraud that have never been part of a UCL cause of action. (*Blakemore, supra* , 129 Cal.App.4th at p. 49.)

(*Anunziato*).)[8]

Pfizer's approach to Proposition 64 would vitiate the role of consumer class actions in redressing unfair business practices under the UCL -- an outcome that would impede the goals of the State's consumer protection statutes.

> Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.

(*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 156, quoting *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808.)

Should the Court nonetheless agree with Pfizer's interpretation of Proposition 64, the Attorney General respectfully requests that the language of the opinion distinguish between private representative actions and public law enforcement actions to make clear that established substantive liability standards (i.e., no proof of injury, monetary damage, actual deception, reliance or causation) continue to apply to claims brought under the UCL by public law enforcement agencies.

1. There Is No Basis To Import Into The UCL Standards Applicable To The Consumer Legal Remedies Act

In arguing for a new liability standard under the UCL, Pfizer points to the phrase

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[8]Because an UCL claim is not the same as a fraud claim, Pfizer's citation to cases denying certification of fraud actions is inapposite. (Petition at p. 42, fn. 9.)

"as a result of" in the standing requirement in section 17204 (Actions for relief shall be prosecuted "by any person who has suffered injury in fact and has lost money or property *as a result of* such unfair competition") and relies on the holdings in *Caro v. Proctor & Gamble Co.* (1993) 18 Cal.App.4th 644 (*Caro*) and *Wilens* v. *TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746 (*Wilens*).[9] (Petition at pp. 31, 36-37.)

Both *Caro* and *Wilens*, however, arose under the Consumer Legal Remedies Act[10] ("CLRA") (Civ. Code § 1789 et seq.).[11] (See *Anunziato, supra,* 402 F.Supp.2d 1133 [discussed at pages 10-12 of the Opposition].) The CLRA and the UCL are separate and distinct statutes, which are substantially different in scope and available relief. Whereas the CLRA lists twenty-three specific practices that are actionable, the UCL broadly

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[9]*Caro* and *Williams,* of course, are pre-Proposition 64 cases. Although Pfizer criticizes plaintiff for relying on *Mass. Mutual* because it is a pre-Proposition 64 case (Petition at p. 31), the fact that both parties rely on pre-Proposition 64 decisions simply underlines that Proposition 64 did not change substantive law governing the burdens of proof applicable to particular causes of action.

[10]Mistakenly referred to as the "Civil Legal Remedies Act" or "Civil Remedies Act" at pages 6 and 31 of the Petition.

[11]Although *Caro* and *Wilens* include UCL claims, the class action analysis focuses on the CLRA and (in *Caro*) other common law claims. Plaintiff in *Caro* also asserted claims for fraud and deceit, negligent misrepresentation, and other contract and statutory claims. *Caro* is further distinguishable because the court concluded that declining to certify the lawsuit as a class action "did not contravene the policies of disgorgement or deterrence" because those policies had "been vindicated in other proceedings." (*Caro* , *supra,* 18 Cal.App.4th at pp. 660-61 ["The utility of class treatment declines when other effective and perhaps more efficient means exist to resolve the problem."].) The court also concluded that plaintiff Caro had not shown that class treatment was superior to the "streamlined procedure" of a non-class representative action available under the UCL pre-Proposition 64. (*Id.* at p. 661.) Finally, the *Caro* court found that individual issues predominated based on its conclusion that the existence of a material misrepresentation was not a common issue. (*Id.* at p. 667.) Material misrepresentation is an element in claims for fraud, negligent misrepresentation, unjust enrichment, and violation of the CLRA, but not in UCL claims.

proscribes as "unfair competition" "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive or untrue or misleading advertising." (*Compare* Civ. Code §1770(a) *with* Bus. & Prof. Code §17200; see also *Kasky, supra,* 27 Cal.4th 939 [By defining unfair competition to include any unfair or fraudulent business act or practice, the UCL sweeps within its scope acts and practices not specifically proscribed by any other law.].)

Additionally, a class action under the CLRA is governed exclusively by the terms of Civil Code section 1781, rather than the more general provisions of Code of Civil Procedure section 382. (*Mass. Mutual, supra,* 97 Cal.App.4th at p.1287.) A plaintiff moving to certify a class under the CLRA, unlike a plaintiff moving under Code of Civil Procedure section 382, is not required to show that substantial benefit will result to the litigants and the court. (*Id.*, at p. 1287, citing *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122,134-35.) Thus, unlike section 382, the CLRA does not require that a plaintiff show a probability that each class member will come forward and prove his separate claim to a portion of the recovery. (*Id.*)

Pfizer's suggestion that liability standards applicable to a CLRA claim should apply to UCL claims because the phrase "as a result of" appears in both statutes thus is misguided. As discussed below with respect to the laws of other states, one cannot simply pluck a phrase from different statutes without considering the context and purpose of the statute in which the phrase appears.

The UCL and the CLRA also differ in the remedies a plaintiff may pursue. Although a plaintiff suing under the CLRA may recover actual and punitive damages, those remedies are not available under the UCL, which allows only for injunctive relief and restitution, as discussed further below. (*Compare* Civ. Code §1780(a)(l), (4) *with* Bus. & Prof. Code §§17203, 17500; see also *Korea Supply, supra,* 29 Cal.4th at p. 1150 ["[T]he overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition' [Citation.] Because of

this objective, the remedies provided [in the UCL] are limited."].) Where a plaintiff seeks monetary damages, as under the CLRA, there is a legitimate basis for requiring reliance and causation. "The same need does not exist when the principal benefit of statutory enforcement ... is protection of the public." (*Anunziato, supra,* 402 F.Supp.2d at p. 1137.)

Pfizer challenges the court's analysis in *Anunziato* on the grounds that it "improperly engaged in its own policy analysis." (Response at p. 10.) While Pfizer may disagree with the court's conclusion, it is apparent that it based its decision on the statutory language of the UCL and the CLRA, and applicable legal standards. As one Appellate Court recently stated:

> Because the damages provision of the CLRA is to compensate for actual loss, and restitution under the False Advertising and Unfair Competition Laws are for different purposes–deterrence and restoration of property acquired unlawfully–a trial court could, when assessing *damages* under the CLRA, apply standards different from those the trial court might use when ordering *restitution* under the False Advertising or Unfair Competition Laws.

(*Colgan, supra,* 135 Cal.App.4th at p. 696.)

Although Pfizer seeks to apply the reliance and causation elements applicable to a CLRA claim to claims brought under the UCL, Pfizer does not suggest expanding the remedies available under the UCL to include actual and punitive damages (which are available under the CLRA), as well as restitution. Instead, Pfizer seeks to curtail the scope of the UCL and transform restitution into a variant of damages (as discussed below) -- a result that would upset the balance created by the UCL drafters and impinge upon the act's purpose of deterring unlawful, unfair or fraudulent business activities. There is no evidence that Proposition 64 was intended to have such an effect.

2. Decisions Construing Consumer Protection Laws Of Other States Are Inapposite

Pfizer's extensive citation to cases interpreting the consumer laws of other states is unpersuasive. There simply are no statutes in other jurisdictions similar to California's UCL. (*Colgan, supra*, 135 Cal.App.4th at p. 684 ["there are no similar statutes in other jurisdictions. Thus, we rely on the language itself and the apparent purposes of the statute."]; *Mass. Mutual, supra*, 97 Cal.App.4th at p. 1291 [defendants' citation to out of state authorities which found class action treatment inappropriate and not persuasive because none of the cases "involve the UCL and its unique scope"].) Out-of-state decisions interpreting dissimilar laws are of limited, if any, utility with respect to Proposition 64's amendment of the UCL.

Pfizer cites to cases interpreting various consumer protection laws of Illinois, Colorado, Connecticut, Indiana, Florida, Louisiana, Maine, New Jersey, Oregon, Pennsylvania, South Carolina, Tennessee and Virginia. (Petition at pp. 7-8, fn. 2.) These cases apparently were chosen because the state law at issue incorporates the phrase "as a result of" and, Pfizer contends, therefore offers guidance as to how to interpret the language of the standing requirement in section 17204. Statutory interpretation, however, is not based upon plucking an identical phrase out of different statutes and then utilizing precedent interpreting that language regardless of context. Instead, "[t]he words of the statute must be construed in context, keeping in mind the statutory purpose...." (*Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1978) 43 Cal.3d 1379, 1387.)

Not only are the state consumer laws at issue in the cases Pfizer cites not identical to the UCL, they also differ from one another. The consumer protection statutes of Connecticut, Florida, Louisiana and South Carolina are patterned exactly after section 5 of the Federal Trade Commission Act. (Unfair and Deceptive Act and Practices, Sixth Ed. (National Consumer Law Center 2004 ("NCLC") § 3.4.2.2; *Collins v. Anthem Health Plans, Inc.* (Conn.2005) 880 A.2d 106 [CONN.GEN STAT. § 42-110b]; *Macias v. HBC of Fla., Inc.* (Fla.3d DCA1997) 694 So.2d 88 [FLA.STAT. § 501.211(2)];

Vickers v. Interstate Dodge (La.Ct.App.2004) 882 So.2d 1236 [La. REV. STAT. § 51:1409(A)]; *Fields v. Yarborough Ford, Inc.* (S.C.Super.Ct.1992) 414 S.E.2d 164 [S.C.CODE ANN. §39-5-140]). In contrast, Colorado, Maine and Oregon base their consumer statutes on the Uniform Deceptive Trade Practices Act. (NCLC, § 3.4.2.4; *Hall v. Walter* (Col.1998) 969 P.2d 224 [COL.REV.STAT.TIT.6 § 1-113(1)(a)]; *State v. Weinschenk* (Me.2005) 868 A.2d 200 [5 ME.REV.STAT. § 213]; *Feitler v. Animation Celection, Inc.* (Or.Ct.App.2000) 13 P.3d 1044 [OR.REV.STAT. § 646.638].) Illinois and New Jersey, in turn, have adopted consumer fraud statutes based on common law fraud principles (NCLC, § 3.4.2.5; *Oliveira v. Amoco Oil Co.* (Ill. 2002) 776, N.E.2d 151 [815 ILCS 505/10a]; *Fink v. Ricoh Corp* (N.J.Super.Ct. 2003) 839 A.2d 942, 955-58 [N.J.Stat.Ann. § 56:8-19]); while Virginia borrows from various models and includes its own special features (NCLC, § 3.4.2.5; *Lambert v. Downtown Garage, Inc.* (Va.Cir.Ct. 1997) 1997 WL 1070462.).

That these various statutes all may be intended to protect consumers does not provide sufficient context to assume that the interpretation of the phrase "as a result of" in one statute can illuminate the meaning of that phrase in another state's law. The argument that out-of-state cases interpreting liability standards under other statutes suggest that the phrase "as a result of" in section 17204 imports reliance and causation standards into the UCL, regardless of the context and purpose of the UCL and Proposition 64, is untethered to established notions of statutory interpretation.

Pfizer's reliance on the unpublished opinion in *Whalen v. Pfizer, Inc.* (N.Y.Sup.2005) 9 Misc.3d 1124(A), 2005 WL 2875291, also does not advance its argument. Plantiff in *Whalen* brought a claim under New York State General Business Law Section 349, which requires proof that the business practice was deceptive or misleading in a material respect and that plaintiff was injured. That is not the liability standard under the UCL. The decision in *Elder v. Pfizer, Inc.* (Cook County, Ill. February 17, 2006, No. 05CH633), a putative nationwide class action for violation of the

Illinois Consumer Fraud Act and other claims, is similarly distinguishable. The elements of a claim under the Illinois statute include a showing of the defendant's intent that the plaintiff rely on the deception. As discussed above, it is not necessary under the UCL to show that the defendant intended to injure anyone. (See, *e.g.*, *Cortez, supra,* 23 Cal.4th at p. 181; *Prata, supra*, 91 Cal.App.4th at p. 1137.) Cases from other jurisdictions, which do not deal with the specific requirements of the UCL, simply are not useful.

B. Proposition 64 Did Not Change The Limited Nature Of The Relief Available Under The UCL

While UCL plaintiffs do not bear the traditional burden of proof required of victims of common law fraud, they also are not eligible for the full panoply of remedies available to plaintiffs alleging common law claims. Proposition 64 did not alter this arrangement; a UCL claimant still is limited to restitution and injunctive relief.

Proposition 64 thus retained intact the existing language of Business and Professions Code section 17203:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments ... as may be necessary to prevent the use or employment by an person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.[12]

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[12]Proposition 64 also left unchanged counterpart language in the first paragraph of section 17535, which states: "Any person, corporation, firm partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments ... as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful."

"[T]he remedy of restitution serves two purposes - returning to the plaintiff monies in which he or she has an interest and deterring the offender from future violations." (*Colgan, supra,* 135 Cal.App.4th at 695.)

Both before and after Proposition 64, section 17203 expressly authorizes courts to make "such orders ... as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person ... any money or property, real or personal, which *may have been* acquired by means of such unfair competition." (Bus. & Prof. Code § 17203 [emphasis added].) Similarly, section 17535, both before and after Proposition 64, provides for restitution of amounts "which *may have been* acquired by means of any practice in this chapter [the false advertising law] to be declared to be unlawful." (Bus. & Prof. Code § 17535 [emphasis added].)

The California Supreme Court has interpreted this language in sections 17203 and 17535 as "unquestionably broad enough to authorize a trial court to order restitution without requiring the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction." (*Fletcher, supra,* 23 Cal.3d at p. 451; *Cortez, supra,* 23 Cal.4th at p. 177, fn. 10 ["The restitutionary remedies of section 17203 and 17535 ... are identical and are construed in the same manner."].)

In arguing that each class member's individual knowledge regarding the Listerine advertisements precludes relief on a class basis, Pfizer dusts off an argument that the *Fletcher* court firmly rejected more than two decades ago:

> we conclude that the trial court erred in determining that the question of each borrower's individual knowledge constituted an insuperable obstacle to the imposition of a class restitution remedy under section 17535. Under the section, the court retains the authority to order restitution without an individualized showing on the knowledge issue if the court determines that such a remedy is necessary "to prevent the use or employment" of the unfair practice at issue in this case.

(*Fletcher, supra*, 23 Cal.3d at p. 453.) As the court explained:

> the trial court may order restitution to the plaintiff class in order to foreclose defendant's retention of any wrongful gains. Because of the relatively small individual recovery at issue here, the court may find that a denial of class status in the present suit by the requirement of proof of lack of individual knowledge would, as a practical matter, insulate defendant from *any* damage claim. Section 17535 authorizes a trial court to order a defendant, who carefully exploited an unfair trade practice so that the individual victims suffered only minor losses, to disgorge the resulting large and illicit sum of money.

(*Id.* at p. 452 (emphasis in original) [finding further that basic equitable principles underlying section 17535 "arm the trial court with broad discretionary power to order restitutionary relief ... in the absence of individualized proof of lack of knowledge"].)

Further, in suggesting that the measure of damages is the difference between the value of the benefit received by the class member and the price she paid for Listerine (Petition at pp. 43-44), Pfizer improperly seeks to introduce a damages analysis into the calculation of restitution on plaintiff's UCL claims. In *People v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 531-32, Division Two of this Court affirmed that broad restitution is appropriate once a plaintiff establishes that a defendant violated the UCL or false advertising law. That the consumer may have gained some benefit from the product is immaterial where the defendant sold the product by means of a false representation.

The purpose of the UCL is to compel a defendant "to return money obtained through an unfair business practice to those persons in interest from whom the property was taken," and thereby deter future violations.[13] (*People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 134 [*quoting Kraus v. Trinity Management*

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[13]The notion that if a plaintiff seeks a refund, he must return the benefit he received, may be an applicable equitable consideration in some circumstances, such as the unjust enrichment claim at issue in *Cal. Fed. Bank v. Matreyck* (1992) 8 Cal.App.4th 125 (cited at page 43 of the Petition), but it is inappropriate in UCL claims given the purpose of the statute.

Services, Inc. (2000) 23 Cal.4th 116, 126-27] (*Kraus*).) A trial court has discretion to return "*any* money ... which *may* have been acquired" through a violation of the UCL (§§17203, 17535; emph. added) without a showing of a consumer's knowledge, reliance or damage resulting from a misrepresentation; the court may exercise its discretion to purge a violator of gains ill-gotten through the violation of law. (*Fletcher, supra,* 23 Cal.3d at pp. 451-52.)

Proposition 64 did not change the UCL's restitutionary regime. The standing requirements of Section 17204 are addressed specifically to who may prosecute an action, not to how to calculate restitution. As a division of this Court stated just a few months ago:

> With respect to the court's equitable powers under the False Advertising Law, the Supreme Court has stated: "A court of equity may exercise its full range of powers 'in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved.'" (*Fletcher, supra*, 23 Cal.3d at p. 452, 153 Cal.Rptr. 28, 591 P.2d 51, quoting *People v. Superior Court (Jayhill)* (1973) 9 Cal.3d 283, 286, 107 Cal.Rptr. 192, 507 P.2d 1400.)

(*Colgan, supra*, 135 Cal.App.4th at p. 698.)

The complaint in this action alleges that Pfizer advertised that Listerine could replace the use of dental floss in reducing plaque and gingivitis, and that such statements were, in fact, false and misleading. (EXP 00048.) Under the UCL, the respondent court could find that all revenue from the sale of Listerine during the period from June 2004 through January 7, 2005 [the temporal limits on the class certified by the court (EXP 00014)] was obtained from the sale of falsely advertised and/or labeled products, or use some other appropriate measure of the amount of restitution necessary to restore purchasers to the *status quo ante*.

Pfizer cannot challenge the respondent court's certification decision by arguing that a burden of proof (individualized knowledge of the fraudulent practice) rejected by the California Supreme Court, and application of an improper measure of damages,

results in the predominance of individual issues. Should the Court accept Pfizer's interpretation of Proposition 64 regarding private class actions, however, the Attorney General respectfully suggests that the Court should make clear in its decision that the longstanding substantive rules on restitution, and the breadth of the court's discretion in determining restitutionary relief, continue to apply to claims brought under the UCL by public law enforcement agencies.

C. The Reference To CCP Section 382 In Business And Professions Code Section 17203 Does Not Alter The Substantive UCL Law

The respondent court certified a class of all persons who purchased Listerine, in California, from June 2004 through January 7, 2005, finding that common questions of fact and law would predominate and that the "commonality factor" was satisfied. (EXP 000008, 00014.) Pfizer challenges this ruling by pointing to the respondent court's statement that "the requirements of 'injury in fact' or 'lost money or property as a result' of the conduct of Defendant Pfizer, as imposed by Proposition 64, may preclude recovery on a class basis." (EXP 00015.) Pfizer also asserts that the respondent court erred in finding that class action elements were met[14] and failed to determine at the time the class was certified how individual issues can be resolved manageably on a class-wide basis.[15] (Petition at p. 2.) In making these arguments, Pfizer ignores basic class action principles and improperly seeks to use class action procedure to restrict substantive rights under the UCL.

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[14]Pfizer premises its argument that the respondent court erred in certifying a class on plaintiffs' UCL claims on application of the wrong liability standards and improper introduction of a damages analysis into the calculation of restitution, discussed above.

[15]This last issue is not separately addressed herein, except to note the obvious point that, if unmanageable issues do arise, the trial court retains the option of decertification. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 335 (*Sav-On Drug Stores*).)

1. Pfizer's Interpretation Of Proposition 64 Would Eliminate Class Treatment Of UCL Claims

The reference to section 382 of the Code of Civil Procedure added to section 17203 by Proposition 64 requires the Court to harmonize section 382 and section 17203 to the extent possible. "There is no inherent incompatability between the unfair competition law and class actions." (*Feitelberg v. Credit Suisse First Boston, LLC, et al.* (2005) 134 Cal.App.4th 997, 1014 (*Feitelberg*).) "Both consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights." (*Id.* at 1014-15, quoting *Kraus, supra,* 23 Cal.4th at p. 126.)

> As stated in an appellate decision published prior to Proposition 64, "a trial court may certify a UCL claim as a class action when the statutory requirements of section 382 of the Code of Civil Procedure are met." [Citation.] That authority is now explicit in the amended statute, which authorizes the pursuit of "representative claims or relief on behalf of others" provided that the claimant "complies with Section 382 of the Code of Civil Procedure ...." (§ 17203, as amended by Prop. 64, § 2.)

(*Id.* at p. 1015.)

"The UCL is a substantive statute and the class action statute is a procedural device for collectively litigating substantive claims." (*Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 670.) As Pfizer itself recognizes, "[c]lass actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going." (Petition at pp. 29, 34, *quoting City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462.) Class certification does not serve either to enlarge or to diminish substantive rights or remedies. "The tail does not wag the dog." (*Feitelberg, supra*, 134 Cal.App.4th at p. 1020.)

Pfizer's interpretation of the impact of the requirements for pursuing representative claims added to section 17203 by Proposition 64 ignores these principles

and seeks to use the class action requirements of section 382 to constrict substantive rights under the UCL. The consequence of this strategy would be to eliminate class treatment of UCL claims. The respondent court raised this very concern at oral argument, stating:

> And I'm troubled by the notion that the arguments that you make could defeat any class treatment for any 17500 claim, or 17200 claim related to a mass-marketed consumer product. And that just doesn't – something doesn't seem right about that.

(EXP 00032-33.)

The respondent court had reason to be troubled, for "if proof of individual damages were required by all potentially affected parties as a condition of class certification, it would go far toward barring all class actions." (*In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 414, *quoting Bell, supra,* 115 Cal.App.4th at p. 744.)

Proposition 64, by adding the requirement that the plaintiff in a representative action comply with section 382 of the Code of Civil Procedure, surely did not intend to eliminate class treatment of UCL claims. And, contrary to Pfizer's arguments, California law does not require individualized proof of damages as a prerequisite to class certification. (*Id.* at p. 417 ["in a class action, the court may address any individual damages issues by devising remedial procedures to make determinations pertaining to each class member's right to recovery."].) Moreover, it has long been established that class certification under section 382 does not require simultaneous or identical injuries. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46; *Sav-On Drug Stores, supra,* 34 Cal.4th at p. 338 ["The Court of Appeal also erred to the extent it stated or implied that the community of interest requirement for certification mandates that class members' claims be uniform or identical."].)

As the Second District Appellate Court recently explained with respect to a class action claim for unfair business practices:

> ... if the class representatives prove Avon engaged in the practices alleged, each class member need not separately establish Avon's liability for engaging in that practice. The class members need only show that they are members of the class ... and the amount of their damages. "The law unequivocally provides that each class member may establish damages independently without threatening the integrity of the class action." [Citation.]

(*Blakemore, supra,* 129 Cal.App.4th at p. 57; see also *Collins* v. *Rocha* (1972) 7 Cal.3d 232, 238 ["that each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action"]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238 ["Differences in individual class members' proof of damages is not fatal to class certification."].) Liability under the UCL may be proven by the class representative post-Proposition 64, just as it could before, and neither proof of individual damages nor identical injuries are a prerequisite to class certification.

2. The Decision To Certify A Class And The Determination Of Relief Are Discrete Inquiries

The respondent court's statement that "the requirements of 'injury in fact' or 'lost money or property as a result' of the conduct of Defendant Pfizer, as imposed by Proposition 64, may preclude recovery on a class basis" provides no grounds to overturn its decision to certify a class. The requirement of "injury in fact" and "lost money or property as a result of" unfair competition is simply the standing requirement added to section 17204 by Proposition 64. Although the respondent court stated that "whether the standing requirements for class members also changed under the UCL is an open question" (EXP 00010), there is no evidence that Proposition 64, in proposing a standing requirement analogous to the "standing requirements of the United States Constitution" (Prop. 64 § 1, subd. (e)), intended to revise class action requirements. Nor would such a change make sense, since "Article III standing and Rule 23 typicality are

discrete inquiries." (*In re Leapfrog Enterprises, Inc. Securities Litigation* (N.D.Cal. Jan. 27, 2006, No. C-03-05421 RMW, Slip Copy) 2005 WL 3801587, at *3.) Just as standing is a separate issue from the decision whether to certify a class, the determination of relief is a discrete inquiry.

Remedies under the UCL are limited to restitution and injunctive relief, as discussed above. Prior to the passage of Proposition 64, restitution was available to members of the public who parted with money or property to the perpetrator of an unlawful, deceptive or unfair business practice. (*Korea Supply*, *supra*, 29 Cal.4th at p. 44; *Kraus, supra*, 23 Cal.4th at pp. 126-27 [order for restitution compels "a UCL defendant to return money obtained through an unfair business practice to those persons who had an ownership interest in the property or those claiming through that person."]; *Fletcher, supra,* 23 Cal.3d at p. 451.) Such restitutionary relief remains available post-Proposition 64. (*Feitelberg, supra,* 134 Cal.App.4th at p. 1013.) Thus, to the extent that the respondent court believed the standing requirement in section 17204 created a new requirement with respect to restitution, its analysis was in error.

"Section 17203 also grants the court the power to make orders necessary to prevent the use of unfair business practices. Such orders may encompass broader *restitutionary* relief, including disgorgement of all money so obtained even when it may not be possible to restore all of that money to direct victims of the practice." (*Kraus, supra*, 23 Cal.4th at p. 129 [emphasis in original].) Appellate courts recently have addressed whether nonrestitutionary disgorgement of profits is an available remedy under the UCL. (*Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 445 (*Madrid*) ["nonrestitutionary disgorgement is not an available remedy in a UCL class action"]; *Feitelberg, supra*, 134 Cal.App.4th at p. 1020 ["Under the logic and compulsion of *Korea Supply*, we conclude that nonrestitutionary disgorgement is not available to a private plaintiff, regardless of the nature of the UCL proceeding as a class action."].) *Restitutionary* disgorgement, however, may be an available remedy in an

UCL class action. (*Madrid, supra,* 130 Cal.App.4th at pp. 460-61; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 318 ["It may be the case that under the UCL a class action would allow for disgorgement into a fluid recovery fund"].)

To the extent the respondent court was acknowledging the evidentiary challenges that class members may face in proving the amounts obtained from them through an unfair business practice, or expressing uncertainty as to how to accomplish restitutionary disgorgement even if it may not be possible to restore all of that money to direct victims of the unfair practice, or suggesting that the viability of certain claims might appropriately be addressed on dispositive motions, such statements do not invalidate the decision to certify a class. The procedures governing federal class actions under Rule 23 do not permit inquiries into the merits of class claims for relief, and the California Supreme Court has recently stated that "we are not convinced that certification should be conditioned upon a showing that class claims for relief are likely to prevail." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443; see also *Lebilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1084 ["[W]e view the question of certification as essentially a procedural one that does not ask whether an action is legally or factually meritorious."].) That some members of the class ultimately may not be able to establish a right to relief, does not preclude class certification. (*In re Cipro Cases I and II, supra,* 121 Cal.App.4th at p. 414.)

CONCLUSION

Proposition 64 was intended to address a particular type of litigation abuse by adding a standing requirement to the UCL, and providing that a person bringing a representative action on behalf of others pursuant to section 17203 must have standing and comply with section 382 of the Code of Civil Procedure. Neither the language nor the purpose of Proposition 64 support the proposition that each and every member of a putative class action must meet the standing requirement, or that the standing

requirement should be utilized to alter liability standards or to bar class treatment for any deceptive advertising claim under the UCL. The task for the court created by Proposition 64 is, in fact, much less dramatic.

By applying the standing requirement to the named plaintiff in a representative action, and then considering the section 382 class certification factors in light of existing UCL liability and class action standards, a court can accomplish the intent of Proposition 64, while preserving the UCL's unique balance between its limited form of relief and its broad purpose of deterring unlawful, unfair or fraudulent business activities. The voters who approved Proposition 64 expected nothing more.

The Attorney General appears as amicus curiae in this case to indicate his concern that consumer class actions remain a viable means of redressing consumer problems, a goal that is vitiated by Pfizer's approach to Proposition 64. The Attorney General also respectfully requests that, in the event the Court agrees with Pfizer, the language of the opinion distinguish between private representative actions and public law enforcement actions, and make clear that the longstanding liability standards and substantive rules on restitutionary relief discussed herein continue to apply to claims brought under the UCL by public law enforcement agencies.

DATED: April 20, 2006

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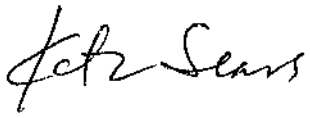
as Amicus Curiae

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 14(c)(1) or 33(b)(1) of the California Rules of Court, the enclosed Brief of the Attorney General As Amicus Curiae is produced using 13-point Roman type including footnotes and contains approximately 10151 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Date: April 20, 2006

Signed:



KATHRIN SEARS
Deputy Attorney General
On behalf of the Attorney General
as Amicus Curiae

DECLARATION OF SERVICE

Case Name: *Pfizer Inc., v. The Superior Court of Los Angeles County*
Case No.: Court of Appeal, Second Appellate Dist., Division Three, Case No. B188106

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102-7004.

On April 20, 2006, I served the attached

BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE

by placing a true copy thereof enclosed in sealed envelopes for overnight delivery via Fedex Express in San Francisco, California, addressed as follows:

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On April 20, 2006, I caused five (5) copies of the aforesaid documents in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102, by personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 20, 2006, at San Francisco, California.

Sandy Shum

Sandy Shum
Signature