S 145775

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

PFIZER INC.,
Petitioner,

vs.

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

STEVE GALFANO,
Real Party in Interest.

Unfair Competition Case
(See Bus. & Prof. Code § 17209 and Cal. Rules of Court, Rule 15(e)(2))

After a Decision by the Court of Appeal
Second Appellate District, Division Three
(Case No. B188106)

County of Los Angeles Superior Court Case No. BC327114

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Page(s)

Statutes

Other Authorities

ANSWER TO PETITION FOR REVIEW

The central issue the Petition ("Pet.") of plaintiff Steve Galfano raises is whether the Court of Appeal correctly held that Proposition 64's standing requirements apply both to the named plaintiff and all class members and not, as Galfano argues, only to class members. The Court's ruling is mandated by the Proposition's express language that *all* "[a]ctions for *any* relief" under Sections 17200 and 17500 of the Business & Professions Code (collectively, the "UCL") "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 that a plaintiff "may pursue representative claims or relief on behalf of others *only* if" he "meets the[se] standing requirements . . . *and* complies with" Cal. Civ. P. Code §382's class certification requirements. (Prop. 64 §§ 2, 3) (emphasis added). Thus, under Proposition 64's plain and unambiguous language, an individual cannot bring an individual action without meeting this standing requirement.

It is a basic principle that "'*[e]ach* class member must have standing to bring suit in his own right.'" *Collins v. Safeway Stores, Inc.*, 187 Cal.App.3d 62, 73 (1986) (emphasis added). That is because a class action "is merely a procedural device for consolidating" "individual" "actions" of "many individuals" that otherwise would have to be "individually litiga-

te[d]."[1] It is, thus, clear that after Proposition 64 an individual who has not suffered injury in fact and lost money or property as a result of alleged unfair competition lacks standing to bring an individual claim. That person does not gain standing where he otherwise has none by virtue of the procedural device of a class action. The Court of Appeal was clearly correct in rejecting plaintiff's argument that Proposition 64 *bars* individual plaintiffs from suing where they have not suffered injury in fact and lost money or property as a result of the alleged unfair competition but *permits* recovery for *the very same uninjured persons* if they are members of a class.

Not only is the Court of Appeal's ruling plainly correct and did it apply long-standing legal principles to Proposition 64, but no California state court other than the Court below has addressed the issue. Accordingly, review is not "necessary to secure uniformity of decision." Rule 28(b)(1).

Equally clear is that the other principal issue the Petition raises – the meaning of Proposition 64's standing requirement that plaintiff "has suffered injury in fact and has lost money or property *as a result of*" the alleged UCL violation – should not be reviewed by this Court. Indeed, it is

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[1] *Vernon v. Drexel Burnham & Co.*, 52 Cal.App.3d 706, 716 (1975); *Washington Mutual Bank v. Super. Ct.*, 24 Cal.4th 906, 913 (2001); *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 435 (2000); *Blue Chip Stamps v. Super. Ct.*, 18 Cal.3d 381, 386 (1976); *Weaver v. Pasadena Tournament of Roses Ass'n*, 32 Cal.2d 833, 838 (1948).

remarkable that Galfano makes no attempt to tell the Court what the phrase *does* mean.

The Proposition's plain language compels the Court of Appeal's conclusion that mere likelihood of harm is no longer sufficient for standing. That is because it cannot be concluded from the fact that an ad has the *capacity* to deceive that an individual plaintiff or class member *in fact* was deceived and suffered injury as a result. Far from conflicting with established law, the Court's decision is fully consistent with case law interpreting the Consumer Legal Remedies Act ("CLRA")'s identical "as a result of language" – that only a consumer "who suffers any damage[s] *as a result of* the use of a [prohibited] method, act or practice" "may bring an action." Thus, the CLRA, which has the same likelihood-of-deception standard as the UCL, *Nagel v. Twin Labs., Inc.* 109 Cal.App.4th 39, 54 (2003), nonetheless requires, because of its "as a result of" provision, that a private plaintiff make a separate showing of "causation" as "a necessary element of proof." *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal.App.4th 746, 753-54 (2003).

The Court of Appeal, equating causation with reliance, also held, quoting Proposition 64's express language, that "[a] consumer who was unaware of, or who did not rely upon, Pfizer's claims comparing Listerine to floss did not suffer any 'injury in fact' as a result of the alleged fraudu-

lent business practice or false advertising." (Slip Opinion ("Op.") 17-18). This holding is consistent with numerous decisions in other states having consumer fraud statutes with identical "as a result of" language that have held, whether using the term "reliance" or "causation," that plaintiff must establish that he saw, heard or read the offending ad, that the ad deceived him, and that the deception proximately caused him injury in fact. It is simply not possible, after Proposition 64, for a plaintiff to demonstrate that he suffered injury in fact "as a result of" an alleged false ad that he did *not* see, hear or read. While some courts equate causation and reliance, and some have suggested that, while the concepts overlap, there may in some circumstances be a difference, there is no need in *this* case for this Court to reach the issue of whether causation and reliance are always equivalent because the Respondent Court plainly erred in holding that *neither* is required here. In all events, because Galfano does not challenge in his Petition the Court of Appeal's reversal of certification of his breach of warranty claim, where the Respondent Court held that reliance *is* an issue, the issue of reliance will remain in this case no matter what this Court does.

Galfano's last argument to support review – that the decision below "cannot be reconciled with" *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006) – is belied by *Mervyn's* itself. To begin with, because the only issue in *Mervyn's* was whether Proposition 64 applied to

actions filed before its enactment, this Court had no occasion to, and did not, construe the phrase "as a result of." Moreover, Galfano's argument that the decision below is inconsistent with *Mervyn's* statement that Proposition 64 "does not change the legal consequences of past conduct by imposing new or different liabilities based on such conduct" (*id.* at 232) confuses the standard for liability with a private action's standing requirements. Distributing advertisements that are likely to mislead consumers is as prohibited after Proposition 64 as before. Under Proposition 64, a private plaintiff must have "suffered injury in fact and lost money or property as a result of" the ad. A consumer who is *likely* to be deceived, but has not *in fact* been deceived, is plainly not a consumer who has been "injured."

Indeed, it is Galfano's argument that cannot be reconciled with *Mervyn's*. In *Mervyn's*, not only did this Court state that "Proposition 64 does prevent *uninjured* private persons from suing for restitution on behalf of others," it also expressly stated that Proposition 64 "withdraws the standing of persons who have not been harmed *to represent those who have*." 39 Cal.4th at 232 (emphasis added). This is directly contrary to Galfano's contention that the Proposition's standing requirements of injury in fact and loss of money or property as a result of a UCL violation do not apply to class members.

In short, the unanimous decision below – which is the *only* decision to have addressed the issues in the Petition – presents no issue worthy of this Court's sparing review jurisdiction. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. The Products and Advertising at Issue

Listerine is an essential oil-containing antimicrobial mouthrinse that, as demonstrated in clinical studies and recognized by the American Dental Association ("ADA"), "kills germs that cause bad breath, plaque and the gum disease gingivitis," and is effective in reducing plaque and gingivitis and killing plaque bacteria between the teeth. (EXP 208, 214, 728, 855, 866). It is sold in numerous flavors and sizes. (EXP 855).

Pfizer conducted two randomized, controlled, observer-blind, 6-month clinical trials according to ADA Guidelines, which were published in leading peer-reviewed journals. Both showed that twice-daily rinsing with Listerine is "at least as good as daily flossing in controlling interproximal gingivitis when both are used unsupervised over a 6-month period," and that it is "significantly more effective than flossing" in reducing interproximal plaque over a 6-month period. (EXP 208-19, 229-39, 241).

After the ADA reviewed the studies and approved Pfizer's "as effective" claim, beginning in June 2002 Pfizer advertised the claim to dental

professionals. (EXP 398-99, 488-89). Pfizer thereafter obtained ADA approval to advertise the claim to consumers, and ran four different versions of a television commercial between June 14, 2004 and January 8, 2005 containing the claim that Listerine is "as effective as floss against plaque and gingivitis between teeth." (EXP 475, 494, 855-56, 867-71). The commercials nowhere expressly stated that Listerine should be substituted for floss, stating instead to "floss daily," "ask your dentist," "ask your dental professional," "of course you should floss," "not a replacement for floss," or "there's no replacement for flossing." (EXP 867-71). None of the commercials ran simultaneously or continuously. (EXP 855-56).

In June 2004, Pfizer began to affix bottle labels stating: Listerine is "Clinically Proven" to be "As Effective As Floss Against Plaque and Gingivitis Between Teeth." Out of 34 different Listerine flavors and sizes, 19 *never* included *any* label that made any floss comparison, and even for the 15 having such labels, not every bottle was shipped with an "as effective" label. (EXP 856-58, 860). Moreover, the "as effective" labels were revised twice over a 6-month period, adding the statements "ask your dentist," "floss daily," and "not a replacement for floss." (EXP 856).

B. <u>Plaintiff's Testimony</u>

Galfano made one Listerine purchase, but does not recall how much he paid and has no receipt. (EXP 755-56, 759, 794-95). He bought Lister-

ine due to the bottle's red label, which he recalled said "as effective as floss," but did not recall what else the label said, and testified unequivocally that he did *not* make his purchase based on any commercial or other ad. (EXP 759-61).

He did *not* change his oral care routine when using Listerine, and does not believe that his Listerine use compromised or injured his dental health. (EXP 775-76, 778). He stated that it was not important to him that Listerine fights plaque and gingivitis because "I know I still need to floss," yet since he stopped using Listerine in January 2005, he has flossed only a "couple of times" and has not purchased floss. (EXP 765, 773-75, 784).

Galfano admitted that he could only testify as to his own experiences, and that it was only by speaking to each class member *individually* that the relevant facts about that member's claim could be determined. Thus, he said he could *not* testify as to whether each class member flossed and, if so, which ones; whether members saw the label(s) (admitting that some people who buy a product regularly do not read the label); whether members who read the statement "floss daily" on the blue label knew that they were supposed to continue flossing when using Listerine; whether members discussed with their dentists whether Listerine was a replacement for floss; or whether members purchased Listerine "because of" the label. (EXP 762-64, 779-80, 782-83). Indeed, his attorney objected to questions

as to these and other facts regarding class members – including what message, if 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).

C. Galfano's Claims

Relying on the Lanham Act preliminary injunction decision in *McNeil-PPC, Inc. v. Pfizer Inc.*, 351 F. Supp.2d 226 (S.D.N.Y. 2005), Galfano asserted two claims against Pfizer: (1) violation of UCL §§ 17200, 17500, and (2) breach of express warranty. Both claims are based on the allegation that Pfizer's advertising "creates a false *impression* that Listerine [mouthrinse] can replace the use of dental floss in reducing plaque and gingivitis." (EXP 048) (emphasis added). Galfano was compelled to frame the allegation in this manner because the survey evidence the court relied on in *McNeil* revealed that only 39% of those questioned about the Listerine label Galfano saw (17% when the control is factored in), and only 30% of consumers (18% with the control) who saw the commercial (which Galfano did not see) took away an implied message that Listerine could be substituted for floss. (EXP 688, 703, 712).

D. The Decisions Below

1. The Trial Court's Decision

On November 22, 2005, the Superior Court (West, J.) granted Galfano's class certification motion. (EXP 004-15). With respect to the UCL claims, the Court held that Proposition 64's standing requirements applied only to Galfano and not to absent class members and, on that basis, found common issues predominated. (EXP 010). Inconsistently, however, and in apparent recognition that it is not possible to prove proximate causation, injury and damages on the facts of this case on a classwide basis, the Court also stated 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 015). With respect to the warranty claim, the Court acknowledged that to succeed reliance must be shown. (EXP 09-10).

2. The Court of Appeal's Decision

On July 11, 2006, the Court of Appeal unanimously reversed in an extensive 21-page opinion by Presiding Justice Klein. After reviewing the abuses that led to Proposition 64's adoption, the Court analyzed the language amending §§ 17204 and 17505, holding that it expressly "prohibits any person, other than the Attorney General or local public prosecutors from

bringing a lawsuit under the UCL . . . unless the person has suffered injury and lost money or property as a result of such violations." (Op. 11).

The Court further held that the Proposition's amendment of §§ 17203 and 17535 expressly "requires private representative actions to meet the requirements of class action lawsuits." (Op. 14). Then, relying on the "basic principle that '[e]ach class member must have standing to bring the suit in his own right,'" and that "a class action is 'merely a procedural device for consolidating matters properly before the court,'" the Court unremarkably held that, in Proposition 64's words, each class member, as well as the named plaintiffs, "must have suffered injury in fact and lost money or property as a result of the unfair competition or false advertising." (Op. 14, quoting *Collins*, 187 Cal.App.3d at 73, *Vernon*, 52 Cal.App.3d at 716).

Relying on the express language of Proposition 64's standing requirements, the Court also held that "the mere likelihood of harm to members of the public is no longer sufficient for standing to sue." (Op. 5, 15).

Finally, the Court held that Proposition 64's express "requirement that a plaintiff have suffered 'injury in fact . . . *as a result of*' the fraudulent business practice or false advertising" required that "a plaintiff actually *relied* on the misrepresentation and as a result, was injured thereby" (Op. 17) (Court's emphasis). The Court explained that "[a] consumer who was unaware of, or who did not rely upon, Pfizer's claims comparing Listerine

to floss did not suffer any 'injury in fact' as a result of the alleged fraudulent business practice or false advertising." (Op. 17-18).

In its Disposition, the Court, "without prejudice to Galfano's bringing a new motion for class certification," issued a writ of mandate "directing respondent superior court to vacate its November 22, 2005 order granting Galfano's motion for class certification and to enter a new and different order denying the motion." (Op. 19 n.9, 21).

Galfano did not petition for rehearing.

ARGUMENT

I.

REVIEW IS NOT NECESSARY TO SECURE UNIFORMITY OF DECISION

There is no conflict as to either of the two issues presented for review. Rule 28(b)(1). Indeed, the decision below is the *only* Supreme Court or Court of Appeal decision that addresses *either* issue under Proposition 64.

A. There Is No Conflict that Proposition 64 Applies to All Class Members

The Court of Appeal's holding that Proposition 64 applies to each class member is mandated by the application of black letter statutory construction rules to the Proposition's unambiguous language and by clear case law of this Court and the Court of Appeal.

1. Proposition 64's Plain Language Provides that the Proposition Applies to All Class Members

It is well established that where "statutory language is clear and unambiguous, its plain meaning must prevail." *Cal. Ins. Guarantee Ass'n v. Workers' Compensation Appeals Bd.*, 128 Cal.App.4th 307, 316 (2005). "'[I]t still remains true, as it always has, that there can be no intent in a statute not expressed in its words, and there can be no intent upon the part of the framers of such a statute which does not find expression in their words.'" *City of Sacramento v. Public Employees' Retirement Sys.*, 22 Cal.App.4th 786, 793 (1994). These "'same principles that govern the construction of a statute'" apply to statutes enacted by citizen propositions. *People v. Foreman*, 126 Cal.App.4th 338, 342 (2005); *People v. Hinkel*, 125 Cal.App.4th 845, 851 (2005).

Proposition 64 could not be clearer. It expressly provides that a consumer must prove that he "suffered injury in fact and lost money or property as a result of" violation of the UCL, and that he cannot avoid this requirement by pleading the claim as a class action:

- Section 3 of Proposition 64 amended §17204 of the Business and Professions Code to provide that *all* "[a]ctions for *any* relief," including individual actions, "pursuant to this chapter shall be prosecuted . . . by the Attorney General or . . . by any person *who has suffered injury in fact and has lost*

money or property as a result of such unfair competition."

(Emphasis added). Proposition 64 does *not* include class members in its exclusion of government officials from these standing requirements. *See Lake v. Reed*, 16 Cal.4th 448, 466 (1997) (applying *expressio unius* "maxim").

- Section 2 of Proposition 64 amended §17203 to provide that a plaintiff "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," which sets forth the requirements for class certification. (Emphasis added).

As this Court stated in *Branick v. Downey Savings & Loan Ass'n*, 39 Cal.4th 235, 240 (2006):

> After Proposition 64, *only* those private persons "who [have] suffered injury in fact and [have] lost money or property" (§§ 17204, 17535) may sue to enforce the unfair competition and false advertising laws. Uninjured persons may *not* sue (§§ 17204, 17535), and private persons may no longer sue on behalf of the general public (Prop. 64, § 1, subd. (f)). (Emphasis added).

Proposition 64's plain language is supported by its explanatory text, which confirms that its standing requirements apply to all class members. Thus, among the "misuse[s]" the people of California did "find and declare" in enacting Proposition 64 were that lawsuits had been filed where

the plaintiff had not "viewed the defendant's advertising" or had not been "injured in fact." Prop. 64 §1(b)(2)-(3). It defies logic (and the plain reading of the statute) that, in enacting Proposition 64, California *barred* individual and representative parties from suing where they had not seen the defendant's advertising (and thus, by definition, could not have been deceived or injured by it), but *permitted* recovery for the *very same persons* if they were class members.

Significantly, while the Court below is the first to address the issue, there is not even a hint in other cases interpreting Proposition 64 that it applies differently to individual and class actions. To the contrary, courts have interpreted it as providing that "a citizen may bring a lawsuit *only* if he or she 'has suffered injury in fact and has lost money or property as a result of such unfair competition.'" *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of Am.*, 129 Cal.App.4th 540, 569-70 (2005) (emphasis added).[2]

Moreover, as the Court below explained (Op. 13-14), application of the class action typicality requirement confirms that Proposition 64's stand-

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[2] *See also, e.g., Harris v. Investor's Bus. Daily, Inc.*, 138 Cal.App.4th 28, 33 (2006) (Proposition 64 "requires that relief may be sought *only* by persons who have *themselves* suffered injury") (emphasis added); *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal.App.4th 1228, 1261 (2005) (Proposition 64 "require[s] that a private party may bring a representative action *only* if he or she meets the standing requirement of section 17204") (emphasis added).

ing requirements apply to each class member. Thus, "'[t]here can be no cognizable class unless it is first determined that members who make up the class have sustained the same or similar damage.'" *Caro v. Procter & Gamble Co.*, 18 Cal.App.4th 644, 663-64 (1993) (holding in §17200 action that named plaintiff had not met typicality requirement because he did not believe the orange juice was "fresh" as advertised, had not read the entire label, and "would have had questions about the juice if he had read the whole label"). *Accord, Collins*, 187 Cal.App.3d at 72 (class members must have sustained a "common harm or damage"). In the words of Proposition 64, a named plaintiff who *suffered injury* as a result of the defendant's alleged deception is not typical of a class member who was *not* injured and *not* deceived.[3]

In short, as this Court acknowledged in *Mervyn's*, Proposition 64 "*withdraws the standing* of persons who have not been harmed *to represent those who have*." 39 Cal.4th at 232 (emphasis added).

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[3] Not surprisingly, none of the cases Galfano cites (Pet. 10-12) remotely suggests – let alone holds – that the claim of a named plaintiff who has been injured by defendant's alleged unlawful actions is typical of that of a class member who suffered *no* actual injury *caused* by defendant's actions.

2. Clear Case Law Mandates Application of Proposition 64 to All Class Members

It is a basic principle that "'[e]ach class member must have standing to bring the suit in his own right.'" *Collins*, 187 Cal.App.3d at 73. That is because a class action "is merely a procedural device for consolidating" "individual" or "separate" "actions" of "many individuals" that otherwise would have to be "individually litigate[d]." *Vernon*, 52 Cal.App.3d at 716; *Washington*, 24 Cal.4th at 913; *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal.4th 319, 339 n.10 (2004); *Linder*, 23 Cal.4th at 435; *Blue Chip Stamps*, 18 Cal.3d at 386; *Weaver*, 32 Cal.2d at 838.

Indeed, Galfano – who makes no effort to construe Proposition 64's clear language – inadvertently concedes that Proposition 64 does, in fact, apply to all class members. Thus, he acknowledges that "*only* persons who have been injured in fact and lost money as a result of the unfair competition or false advertising have standing to bring actions for relief under the UCL;" that it was the "'intent of California voters . . . to eliminate frivolous unfair competition lawsuits while protecting the right of *individuals* to . . . file an action for relief pursuant to [the UCL]'"; and that each class member must possess an "*individual claim*" that he could "bring . . . before the courts." (Pet. 3, 7, 20) (emphasis added). Moreover, in attempting to distinguish *Collins*, Galfano once again inadvertently concedes his error, stat-

ing that "some of the proposed class members in *Collins* were completely unharmed." (Pet. 15). Precisely. Proposition 64 was enacted to eliminate such claims. Under Proposition 64, consumers who are *un*harmed have *no* claim and can*not* be class members.

3. Galfano's Misplaced Reliance on Decisions Interpreting Article III of the U.S. Constitution

Galfano contends that Proposition 64 imposes the same "standing requirements" as Article III of the U.S. Constitution. (Pet. 12). He ignores, however, that the U.S. Supreme Court has held that the "irreducible constitutional minimum of standing" requires a showing of "concrete and particularized" and "actual or imminent" "injury in fact," and "a causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In apparent recognition that Article III's requirements are fatal to his case, Galfano argues that they apply differently in class actions. (Pet. 12-13). But it is black letter law that these requirements are "no less true with respect to class actions than with respect to other suits." *Lewis v. Casey*, 518 U.S. 343, 357 (1995). *Accord, Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976). Ignoring these decisions, Galfano relies on a federal decision holding that named plaintiffs who alleged they were injured as a result of securities misrepresentations (*i.e.*, that they "relied on defendant's misrepresentations and purchased stock at an artificially infla-

ted rate") did not lose standing to assert claims on behalf of class members who were injured by misrepresentations made before the named plaintiffs had acquired their stock. *In re Leapfrog Enters. Securities Litig.*, 2005 WL 3801587, *3 (N.D. Cal. Nov. 23, 2005). The case did not remotely suggest that a class member who was *not* injured or whose injury was *not* caused by defendant's misrepresentation could recover money either in an individual action or as a class member.[4]

B. There Is No Conflict as to the Meaning of Proposition 64's Standing Requirement that a Plaintiff Have Suffered Injury "As a Result" of Violation of the UCL

The decision below is the *only* reported California state court decision addressing the meaning of Proposition 64's standing requirement that, to assert a claim, a plaintiff must have "suffered injury in fact and lost money or property as a result of" the alleged violation of the UCL.[5]

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[4] The other cases Galfano cites hold that where a case becomes moot as to the named plaintiff, under certain circumstances he can proceed as a named plaintiff where there is still a live controversy for class members. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 401–07 (1980); *Sosna v. Iowa*, 419 U.S. 393, 399-402 (1975); *LaDuke v. Nelson*, 762 F.2d 1318, 1324-25 (9th Cir. 1985). None even hints that the obverse would be true – that a named plaintiff who *has* standing can assert claims, and seek monetary relief, on behalf of class members who do *not* have standing.

[5] In *Laster v. T-Mobile USA, Inc.*, 407 F. Supp.2d 1181, 1994 (S.D. Cal. 2005), the court held that "[t]he language of the UCL, as amended by Proposition 64, makes clear that a showing of causation is required." In *Anunziato v. eMachines, Inc.*, 402 F. Supp.2d 1133, (continued...)

Moreover, the holding below is mandated by the Proposition's express language and is fully consistent with decisions applying the same or similar language in California Civil Code §1780(a) and other states' consumer fraud statutes. Indeed, it is telling that in a case where a key issue is the proper interpretation of the phrase "as a result of," *nowhere* does Galfano or the Respondent Court ever state what they believe the phrase *does* mean.

1. The Plain Meaning of Proposition 64

Proposition 64 expressly requires that a plaintiff prove that he "suffered *injury in fact* and lost money or property *as a result* of" the alleged deception. There is no ambiguity in this provision. The dictionary definition of "result" means "to proceed, spring or arise as a consequence, effect, or conclusion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1937 (2002). Relying on this definition, the U.S. Court of Appeals held that the phrase "resulting from" in an insurance contract means "the test of proximate cause." *American Ins. Co. v. Keane*, 233 F.2d 354, 360 (D.C. Cir. 1956), citing MERRIAM-WEBSTER NEW INT'L DICTIONARY (2d ed. 1953).

Significantly, in interpreting the CLRA's identical language – that only a consumer "who suffers any damage[s] *as a result of* the use of a [prohibited] method, act or practice" "may bring an action," CAL. CIV.

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[5] (...continued)
1137 (C.D. Cal. 2005), the court, without any analysis of Proposition 64's language, held that causation was not required.

CODE §1780(a) (emphasis added) – the Court of Appeal held that "[r]elief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof." *Wilens*, 120 Cal.App.4th at 754. Indeed, the people of this State are "'deemed to [have been] aware'" of this "judicial construction[]" when they enacted Proposition 64 with the identical language. *Hobbs v. Municipal Ct.*, 233 Cal.App.3d 670, 682 (1991), quoting *People v. Weidert*, 39 Cal.3d 836, 844 (1985). As this Court explained in interpreting a citizen initiative by adopting the interpretation given to identical language in other statutes, "'[i]t is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts.'" *In re Jeanice D.*, 28 Cal.3d 210, 216 (1980).

Moreover, numerous courts interpreting other states' consumer fraud statutes having identical "as a result" of language have held that the plaintiff must establish that he saw the offending ad, the ad deceived him, and the deception proximately caused him injury in fact.[6] Indeed, in *Whalen v.*

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[6] *See, e.g., Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 148-49, 154-55 (2002) (interpreting 815 ILCS 505/10a); *Hall v. Walter*, 969 P.2d (continued...)

Pfizer – which Galfano concedes "challenge[d] the same advertising on behalf of putative classes from consumers from [New York]" and "present[ed] essentially the same issues as those present in this action" – the Court, in denying class certification, interpreted New York's General Business Law §349(h), which is similar to Proposition 64, as requiring that "the proof must show that *each* plaintiff was reasonably deceived by the defendant's misrepresentations and was injured by reason thereof." (EXP 080, 1447) (court's emphasis). Similarly, the Circuit Court in Chicago denied certification of a claim challenging the same Listerine ads, holding that there were individual issues of "proximate causation" under the Illinois Consumer Fraud Act, 815 ILCS 505/10a, which contains the identical "as a

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6 (...continued)
224, 235 (Col. 1998) (COL. REV. STAT. TIT. 6 §1-113(1)(a)); *Collins v. Anthem Health Plans, Inc.*, 275 Conn. 309, 334-36 (2005) (CONN. GEN STAT. §§42-110b, g); *Captain & Co. v. Stenberg*, 505 N.E.2d 88, 98 (Ind. Ct. App. 1987) (BURNS IND. CODE ANN. §24-5-0.5-4); *Rollins, Inc. v. Butland*, 932 So.2d 1172 (Fla. Ct. App. 2006) (FLA. STAT. §501.211(2)); *Vickers v. Interstate Dodge*, 882 So.2d 1236, 1244 (La. Ct. App. 2004) (LA. REV. STAT. §51:1409(A)); *State v. Weinschenk*, 868 A.2d 200, 209 (Me. 2005) (5 ME. REV. STAT. §213); *Feitler v. Animation Celection, Inc.* 13 P.3d 1044, 1047 (Or. Ct. App. 2000) (OR. REV. STAT. §646.638); *Weinberg v. Sun Co.*, 565 Pa. 612, 618 (2001) (73 PA. STAT. §201-9.2); *Fields v. Yarborough Ford, Inc.*, 414 S.E.2d 164, 166 (S.C. Super. Ct. 1992) (S.C. CODE ANN. §39-5-140); *Land v. Dixon*, 2005 Tenn. App. LEXIS 401, *12 (Tenn. App. Ct. July 12, 2005) (TENN. CODE. ANN. §47-18-109(a)(1)); *Lambert v. Downtown Garage, Inc.*, 1997 Va. Cir. LEXIS 457, *5-6 (Va. Cir. Ct. Nov. 25, 1977) (VA. CODE ANN. §59.1-204).

result of" language as does Proposition 64. *Elder v. Pfizer Inc.*, Slip. Op. at 9, No. 05CH633 (Cir. Ct. Cook County, Ill. Feb. 17, 2006), *leave to appeal denied* (Ill App. Ct. 1st Dist. June 8, 2006).

Finally, the phrase "as a result of" in other California and state statutes has been held to require a showing of causation. *See, e.g., DuPuy v. Bd. of Retirement*, 87 Cal.App.3d 392, 399 (1978) ("as a result of" language requires showing of a "causal connection"); *Brown v. Gardner*, 513 U.S. 115, 119 (1994) ("'as a result of' language . . . is naturally read simply to impose the requirement of a causal connection"); *Williams v. U.S.*, 503 U.S. 193, 206 (1992) ("as a result of" language requires "a determination whether the sentence was imposed 'as a result of' the District Court's erroneous consideration of his prior arrests not resulting in prosecution"). In all events, Galfano's interpretation of Proposition 64 would also 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), because it would permit every class member to obtain restitution even though most were *not* misled. (*See* p. 9, *supra*).[7] *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134,

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[7] 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); *Gerawan*, 24 Cal.4th at 494.

1146 (2003) ("In ascertaining the Legislature's intent, [the court] attempt[s] to construe the statute to preserve its constitutional validity").

Given that proximate causation and injury are plain requirements of Proposition 64's unambiguous language, it is clear that the Court of Appeal correctly held that, in order to establish standing, a plaintiff must show more than that the ad is likely to deceive; he must show that he saw, read or heard the offending ad and been deceived as a result. That holding is also fully consistent, as we already have shown, with case law under the CLRA, which contains the identical "as a result of language." (*See* pp. 20-21, *supra*).

2. The Decision Below Does Not Conflict with *Children's Television* or *Mervyn's*

a. *Children's TV*

The Court below stated that, given Proposition 64's express language, "the mere likelihood of harm to members of the public is no longer sufficient for standing to sue." (Op. 15). Galfano argues (Pet. 8) that this conflicts with *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197 (1983). In that Pre-Proposition 64 representative action, this Court stated that "[t]o state a cause of action under [the UCL], it is necessary only to show that 'members of the public are likely to be deceived.'" *Id.* at 211.

In challenging the Court's ruling below, Galfano confuses the standard for determining whether an ad violates the UCL with the separate standing requirements of causation, injury in fact and loss of money or property Proposition 64 imposes as a condition for monetary recovery. As the Court of Appeal held (Op. 5, 15), under the express terms of Proposition 64, an ad that is likely to mislead the public violates the UCL and may be enjoined in an action by the Attorney General. Indeed, courts apply the same standard of violation under the CLRA – whether a statement is "likely to mislead a reasonable consumer"– as under the UCL. *Nagel*, 109 Cal.App.4th at 54. Nonetheless, as shown above (pp. 20-21), the identical "as a result of" language in the CLRA "mak[es] causation a necessary element of proof." *Wilens*, 120 Cal.App.4th at 754.

Galfano also argues, relying on *Children's TV*, that "a consumer fraud plaintiff may bring a class action *without* individualized proof of reliance." (Pet. 21) (Galfano's emphasis). *Children's TV*, however, was a representative action – the very type of action Proposition 64 was designed to eliminate. Thus, the Court had no need to, and did not, address the standard for standing for monetary recovery in a private UCL action and, of course, nowhere did it address the meaning of the phrase "as a result of."

Moreover, the decision below is fully consistent with this Court's decisions addressing the standard for standing for monetary recovery in a

private UCL action. The Court addressed this issue of a private party's standing to obtain restitution in *Korea*, holding that "remedies are limited" under the UCL and that the only monetary relief a court could order was restitution. 29 Cal.4th at 1144, 1148. In particular, it held that under the UCL, "restitution is limited to restoring money or property to *direct victims* of an unfair practice" – a "restitutionary form of disgorgement" – and that "*non*restitutionary disgorgement" is not a permissible UCL remedy. *Id.* at 1148, 1150-51 (emphasis added). As this 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," "*[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), this Court held that *only* those present and former tenants who were overcharged were entitled to refunds. As Galfano himself notes, under the "parallel language found in the same UCL section at issue here," 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) (Galfano's emphasis).

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." *Fei-*

telberg v. Credit Suisse First Boston LLC, 134 Cal.App.4th 997, 1020 (2005). "With restitutionary disgorgement, the focus is on the plaintiff's loss." *Id.* at 1013. Accordingly, "the amount of restitution" that may be awarded is that amount "necessary to make *injured* consumers whole" and "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).[8]

By definition, where an ad is likely to deceive the public, but a particular plaintiff was not deceived and suffered no injury, there is no amount of restitution "necessary to restore [him] to the status quo ante." *Colgan*, 135 Cal.App.4th at 700. He was not a "victim" (direct or otherwise) "of an

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[8] The Court in *Colgan* did not, as Galfano asserts, "*determine*[] that" the amount of restitution "*would include* an expert's quantification of 'either the dollar value of the consumer impact or the advantage realized by [the defendant].'" (Pet. 14 (emphasis added), quoting out of context *Colgan*, 135 Cal.App.4th at 700). All the Court held was that there was no evidence of the amount of restitution necessary to restore injured purchasers to the status quo. *Id.* at 697-99.

Also misplaced is Galfano's reliance (Pet. 22) on *Boeken v. Philip Morris Inc.*, 127 Cal.App.4th 1640 (2006), which was an individual products liability action where no UCL claim was asserted. In upholding the jury's reliance finding on plaintiff's fraud claim, the Court held that the plaintiff "remembered the [defendants' ads'] themes with fair certainty, as well as how they enticed him to smoke with false images," and that he testified that if the defendant had "made it clear to him . . . that cigarettes cause lung cancer and death, he would not have smoked." *Id.* at 1663-66.

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." *Id.*; *Korea,* 29 Cal.4th at 1152; *Madrid v. Perot Sys. Corp.*, 130 Cal.App.4th 440, 455 (2005); *Feitelberg*, 134 Cal.App.4th at 1012-13. Thus, the Court of Appeal's decision that the "'likely to be deceived'" standard cannot be reconciled with the plain language of Proposition 64's new standing requirements" is fully consistent with this Court's prior decisions interpreting the standard for standing for monetary recovery in a private UCL action.[9]

b. ***Californians for Disability Rights v. Mervyn's***

The only issue in *Mervyn's* was whether Proposition 64 applied to actions filed before its enactment. This Court had no occasion to, and did

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[9] *Fletcher v. Security Pacific Nat'l Bank*, 23 Cal.3d 442 (1979), cannot, as Galfano asserts, be read to permit recovery to persons who were *not* injured and *not* deceived because it would be directly contrary both to Proposition 64's express language and to *Korea*. Moreover, *Fletcher* is distinguishable. It involved a failure to disclose – not, as here, an alleged affirmative misrepresentation that created an allegedly "false impression" (EXP 048) – and every class member suffered injury because yearly interest for everyone was calculated on a 360-day basis. 23 Cal.3d at 454. Similarly misplaced is amicus Consumers Attorneys of California's reliance on *People ex rel. Lockyer v. Fremont Life Ins. Co.*, 104 Cal.App.4th 508 (2002), which predates and is inconsistent with *Korea*. *See id.* at 531 ("across-the-board restitution may . . . be ordered *without* proof that consumers were *deprived of money or property as a result of an unfair business practice*") (emphasis added).

not, construe the phrase "as a result of." Nevertheless, Galfano contends (Pet. 1, 3, 8) that the decision below is "utterly inconsistent" with, and "inherently and unambiguously contrary to," *Mervyn's* because, he says, it "cannot be reconciled with" *Mervyn's* statement that Proposition 64

> does not change the legal consequences of past conduct by imposing new or different liabilities based on such conduct. (Citation) The measure left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. (39 Cal.4th at 232).

In asserting this argument, Galfano makes the same mistake he makes in relying on *Children's TV* – confusing the standard for liability with the standing requirements in a private action. After Proposition 64, distributing advertisements likely to mislead consumers is as prohibited as before, just as it is prohibited under the CLRA with its identical "as a result of" requirement. What has changed is that now a plaintiff, to have standing, must have "suffered injury in fact and lost money or property as a result of" violation of the UCL. Indeed, it is Galfano's argument that is irreconcilable with *Mervyn's*. *Mervyn's* expressly states that "Proposition 64 does prevent *uninjured* private persons from suing for restitution on behalf of others" (Court's emphasis), and that the Proposition "*withdraws* the standing of persons who have not been harmed *to represent those who have.*" 39 Cal.4th at 232 (emphasis added). A consumer who is *likely* to be deceived,

but has not *in fact* been deceived, is plainly not a consumer who has been "injured" or "harmed," and nothing in *Mervyn's* is to the contrary.

3. Galfano's Mistaken Reliance on Non-California Authority

The Court of Appeal held, quoting Proposition 64's express language, that a "[a] consumer who was unaware of, or who did not rely upon, Pfizer's claims comparing Listerine to floss did not suffer any 'injury in fact' as a result of the alleged fraudulent business practice or false advertising." (Op. 17-18). This holding is consistent with numerous other decisions in other states having consumer fraud statutes with identical "as a result of" language that have held, whether using the term "reliance" or "causation," that plaintiff must establish that he saw, heard or read the offending ad, that the ad deceived him, and that deception proximately caused him injury in fact. (*See* p. 21 n.6, *supra).* It is simply not possible after Proposition 64 for a plaintiff who did not hear, see or read an ad to demonstrate that he suffered injury "as a result" of the alleged false ad. While many courts have equated reliance and causation, others have held that while the two are not necessarily the same, causation is plainly required.[10] There is no need, however, for this Court to explore in this case the difference, if any, between causation and reliance because the Respondent Court erred in holding that *neither* was required. What is more, the

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[10] *E.g., Stutman v. Chemical Bank*, 95 N.Y.2d 24, 30 (2000).

issue of reliance under the breach of warranty claim will remain in the case (EXP 015) no matter what the Court does with respect to the UCL claim.

Moreover, Galfano has misstated the law of other states whose consumer fraud statutes contain the same "as a result of" phrase in an attempt to argue that the decision below conflicts with them. (Pet. 23-30). For example, in Illinois, he relies on older cases and ignores recent Illinois Supreme Court cases holding that the plaintiff must prove that he "saw, heard or read" the challenged ad, that the ad "deceived" or "misled" him, and that the "actual deception" "induced" his purchase. *Oliveira*, 201 Ill.2d at 140, 148; *Shannon v. Boise Cascade Corp.*, 208 Ill.2d 517, 525 (2004). With respect to New Mexico, the case cited does not even address the issue of reliance, and cases for three states involve actions by the Attorney General and not by private parties and thus are irrelevant here. As for the remaining states, they, like all of the other states Galfano refers to, require a showing of injury and proximate causation in a private action seeking money.[11]

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[11] *See Zine v. Chrysler Corp.*, 600 N.W.2d 384, 399 (Mich. App. Ct. 1999) (requiring showing of "proximate cause"); *Lilly v. Hewlett-Packard Co.*, 2006 U.S. Dist. LEXIS 22114, *14 (S.D. Ohio Apr. 21, 2006) ("whether it be termed an issue of reliance or an issue of proximate cause . . ., there must be a cause and effect relationship between the defendant's acts and the plaintiff's injuries"); *Collins*, 275 Conn. at 334 ("plaintiffs must prove . . . that [the] class member suffered a loss that was caused by" defendant); *Rollins*, 932 So.2d 1172 (Fla.) (plaintiff must show "causation"); *Woods v. Walgreen Co.*, 2003 U.S. Dist. LEXIS 4060, *7 (W.D. Ky. Mar. 17, 2003) (continued...)

Galfano also argues that because the UCL was "patterned" after the FTC Act, federal decisions interpreting the Act are "persuasive." (Pet. 24). But none of the three cases Galfano relies on addresses the meaning of "as a result of." Two involved an FTC action seeking a cease and desist order, and thus are irrelevant to whether a private party has standing to seek monetary relief under the UCL or any other "little FTC" act. *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937); *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212 (9th Cir. 1979). The third held that "there may be no [consumer] redress without proof of injury caused by th[e] practices" found violative of the FTC Act. *FTC v. Figgie Int'l*, 994 F.2d 595, 605 (9th Cir. 1993). The court further held that although there was a "presumption of actual reliance" under the Act, if the defendant "prove[s] the absence of reliance" with respect to particular consumers, then those consumers can*not* be awarded redress. *Id.* at 605-06. In other words, as Galfano ultimately concedes (Pet. 26), causation and reliance *are* required for an award of consumer monetary relief under the Act, which hardly supports his contention that Proposition 64 requires neither.

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[11] (...continued)
(plaintiff must "show" a "causal relationship"); *Willard v. Bic Corp.*, 788 F. Supp. 1059, 1071 (W.D. Mo. 1991) (plaintiff's "ascertainable loss" must be "proximately caused by defendant's actions"); *Smoot v. Physicians Life Ins. Co.*, 135 N.M. 265, 270 (App. Ct. 2003) ("requir[ing] proof of a causal link").

II.

REVIEW IS NOT NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW

That Proposition 64 was an important citizen initiative does not mean that every issue it presents is an "important question of law," Rule 28(b)(1), any more than that every issue raised by such important legislation as the civil rights and labor laws presents an important question of law warranting this Court's review. Thus, for example, because there was a conflict regarding the important question of whether Proposition 64 applies to cases filed before its enactment, review by this Court was warranted. But if Proposition 64 had stated expressly that it applied to such cases, even though the issue's importance would have been the same, it would not have warranted this Court's review. That is the situation here – Proposition 64 on its face unambiguously applies to all class members and imposes a causation or reliance requirement. In short, while the questions of whether the Proposition applies to all class members and imposes a causation or reliance requirement are, undoubtedly, important, they do not present important *questions of law* for this Court's review. Indeed, the Court of Appeal's decision applies well established legal principles to a new statute.

In all events, reviewing the Court of Appeal's decision would be premature. Its decision granting a writ of mandate regarding a class certification order is interlocutory. Indeed, because the Court did not address

predominance and other class certification issues (*see* Op. 9 n.2), and limited its decision to interpreting Proposition 64, even if this Court were to disagree on the issue of whether the Proposition imposes a causation or reliance requirement, it would not affect the Court of Appeal's Disposition requiring entry of an order denying class certification. (Op. 21). Moreover, by failing to seek review of the Court's reversal of the breach-of-warranty class, where the Respondent Court held that reliance *is required* (EXP 09-10), Galfano waived any objection to that portion of the ruling. Thus, any decision by this Court will not affect that ruling and reliance will remain a part of this case no matter what this Court does. It would be far better for the Respondent Court to decide the class issues in the first instance, followed by Court of Appeal review of that decision, and only then, if necessary, for this Court to consider the ruling, based on a full record and with the benefit of the Court of Appeal's decision.

Finally, this is the first case to address the meaning of Proposition 64's standing requirement. From a jurisprudential viewpoint, it would be better to "wait for an issue to be debated thoroughly – or 'percolate' – in the Courts of Appeal before review is granted, and to wait for a case that presents the best 'vehicle' for supreme court review." Eisenberg, *et al.*, Cal. Prac. Guide Civ. Appeals & Writs ¶ 13.73.1 (2006). As Justice Stevens explained with respect to interpretations of federal law:

> [E]xperience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

Stevens, "Some Thoughts on Judicial Restraint," 66 JUDICATURE 177, 183 (1982).

CONCLUSION

For the foregoing reasons, plaintiff's petition for review should be denied.

Dated: August 31, 2006

Respectfully submitted,

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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-defendant Pfizer Inc., hereby certifies that this Answer to Petition for Review (including 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 8,391 words as calculated using the word count function of WordPerfect.

By: _____
Jeffrey S. Gordon

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 1600, Los Angeles, California 90067.

On August 31, 2006, I served the following document described as **ANSWER TO PETITION FOR REVIEW** by placing a true copy of the above-entitled document in a sealed envelope addressed as follows:

See Attached Service List

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Executed on August 31, 2006, at Los Angeles, California.

Lisa Mammone

Signature

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