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August 22, 2006

VIA FEDERAL EXPRESS

Honorable Ronald M. George, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Pfizer, Inc. v. Superior Court (Galfano)*
Court of Appeal No. B188106
Request for Depublication [Cal. Rules of Court, rule 979(a)]

To the Chief Justice and the Associate Justices of the California Supreme Court:

On behalf of real party in interest, Steve Galfano, we request depublication of Pfizer, Inc. v. Superior Court (Galfano) (Court of Appeal No. B188106, filed July 11, 2006), 141 Cal.App.4th 290, 45 Cal.Rptr.3d 830.

I. THE INTEREST OF STEVE GALFANO

Steve Galfano is the real party in interest in the opinion entitled, Pfizer, Inc. v. Superior Court (Galfano). Mr. Galfano filed the underlying action on behalf of himself and others similarly situated, alleging that defendant Pfizer, Inc. ("Defendant") violates California's unfair competition law ("UCL") (Bus. & Prof. Code §§ 17200 *et seq.* and 17500 *et seq.*) through its advertising of Listerine in a manner that warrants that it can replace the use of dental floss.

II. WHY PFIZER, INC. V. SUPERIOR COURT (GALFANO) SHOULD NOT BE PUBLISHED

The opinion entitled, Pfizer, Inc. v. Superior Court (Galfano) should not be published because (A) it is inconsistent with this Court's decision in Californians for Disability Rights v. Mervyn's, LLC (July 24, 2006) 39 Cal.4th 223, 138 P.3d 207, 46 Cal.Rptr.3d 57, which was certified for publication 13 days ***after*** the Pfizer decision; (B) it was not drafted with full attention to the precedent set forth by this Court with respect to typicality and reliance; (C) it nullifies the express language contained in Proposition 64 that allows consumers to bring representative false advertising

claims under the UCL; and (D) it disregards the compelling rationale adopted by the United States Supreme Court, the Ninth Circuit, and other consumer-oriented states in the nation which have consumer protection laws analogous to the current UCL. Thus, the Pfizer case should not remain as precedent.

A. Pfizer Is Inconsistent with this Court's Recent Decision in Mervyn's.

Proposition 64, which was approved by the voters in the November 2004 General Election, amended the UCL to inject a standing requirement for UCL actions.[1] The appellate court in Pfizer recognized that prior to Proposition 64's enactment, "in order to state a cause of action under either the UCL [Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.*] or the FAL [False Advertising Law, Bus. & Prof. Code § 17500 *et seq.*], case law only required a showing that " 'members of the public [were] *likely to be deceived.*' [Citations.]" (Children's Television, Inc. v. General Foods Corp., supra, 35 Cal.3d at p. 211, 197 Cal.Rptr.783, 673 P.2d 660, italics added.) Allegations of actual deception, reasonable reliance and damage were unnecessary. (Ibid.)" Pfizer, 45 Cal.Rptr.3d at 850, 141 Cal.App.4th 290.

Nonetheless, contrary to the long-established law interpreting the UCL, the appellate court in Pfizer found that Proposition 64 abolished the UCL's "likely to be deceived" standard. Id. at 844, 850-851. This holding, however, cannot be reconciled with this Court's recent decision in Californians for Disability Rights v. Mervyn's, LLC (July 24, 2006) 39 Cal.4th 223, 138 P.3d 207, 46 Cal.Rptr.3d 57, wherein the Supreme Court unanimously held that there was no substantive change to the UCL:

> To apply Proposition 64's standing provisions to the case before us is not to apply them "retroactively," as we have defined that term, because the measure 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.***
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> **********
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> [T]he only rights and expectations Proposition 64 impairs hardly bear comparison with the important right the presumption of prospective operation is classically intended to protect, namely, ***the right to have liability-creating conduct evaluated under the liability rules in effect at the time the conduct occurred.*** (Citations.)

[Mervyn's, 46 Cal.Rptr.3d at 64-65 (citations and footnote omitted; emphasis added).]

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[1] *See* Bus. & Prof. Code §§17203, 17204, 17535.

The Pfizer court's holding that Proposition 64 abolished the well-settled and long-standing "likely to deceive" standard under the UCL [Pfizer, 45 Cal.Rptr.3d at 844, 850-851]cannot be reconciled with the California Supreme Court's decision in Mervyn's because (1) prior to Proposition 64's enactment, a business practice was forbidden if "members of the public are likely to be deceived," and (2) Proposition 64 left entirely unchanged the substantive rules governing business and competitive conduct [Id. at 64-65]. Accordingly, it necessarily follows that, pursuant to this Court's ruling in Mervyn's, conduct that is "likely to deceive" cannot be permitted after Proposition 64. To hold otherwise leads to inconsistent results. For this reason, the Pfizer opinion should not remain as precedent.

B. Pfizer Was Not Drafted with Full Attention to the Precedent Set Forth by this Court with Respect to Typicality and Reliance.

1. Typicality

The appellate court in Pfizer also erroneously held that all class members being represented by the named plaintiff must have suffered an injury in fact and lost money or property as a result of a UCL violation. Pfizer, 45 Cal.Rptr.3d at 844, 849, 141 Cal.App.4th 290. However, the rationale underlying the appellate court's abrogation of the well-established law that "reliance" and proof of "injury in fact" are not elements for a UCL action is inherently flawed. The appellate court made the following deduction: since Proposition 64 imposed a requirement that the representative plaintiff satisfy the requirements applicable to class actions, a class representative cannot satisfy the "typicality" requirement if he or she must prove "reliance" and "injury in fact," while the rest of the class does not. Pfizer, 45 Cal.Rptr.3d at 844, 849, 141 Cal.App.4th 290.

The appellate court's rigid view of typicality in Pfizer is directly contrary to this Court's opinion in Richmond v. Dart (1981) 29 Cal.3d 462, 174 Cal.Rptr. 515, 629 P.2d 23, where it ruled that "typicality" does not require absolute identity in facts and interests. Id. at 473. The typicality issue relates to whether the class representative has the ability to represent the class' interests – not vice versa. Indeed, the class representative ***who meets standing requirements*** must prove each of the elements that the rest of the class has to prove – the fact that the class representative might have additional standing requirements is ***completely irrelevant*** to the "typicality" requirement.

Furthermore, Proposition 64's stated intent was to require named plaintiffs to demonstrate an injury in fact under the standing requirements of Article III of the United States Constitution, which in turn, requires that federal courts exercise jurisdiction only over justiciable "cases" or "controversies." Anunziato v. eMachines, Inc. (C.D. Cal. 2005) 402 F.Supp.2d 1133 1138-1139 [citing Prop.64 §1(e)]; U.S. Const., art. III, §2.

> In the class action context, Article III standing simply requires that the class representatives satisfy standing individually. No more is required. Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class

> standing requirement in the constitutional sense. Once the class representatives individually satisfy standing, that is it: standing exists. The presence of individual standing is sufficient to confer the right to assert issues that are common to the class, speaking from the perspective of any standing requirements.

In re Leapfrog Enterprises, Inc. Securities Litigation (N.D.Cal. 2005) 2005 WL 3801587, *3 [internal quotations and citations omitted]. *See also* LaDuke v. Nelson (1985) 762 F.2d 1318, 1325 [Standing "is a jurisdictional element satisfied prior to class certification." (Citing Sosna v. Iowa (1975) 419 U.S. 393, 399; 95 S.Ct. 553, 557.) "[T]he personal stake necessary to satisfy Article III's case or controversy requirement is satisfied by the class representative's cognizable interest in the certification decision." (Citing United States Parole Commission v. Geraghty (1980) 445 U.S. 388, 404; 100 S.Ct. 1202, 1212)]; Alba Conte & Herbert Newberg, Newberg on Class Actions (4th ed. 2002) §2:5. Thus, contrary to Pfizer, a class representative, who has been injured in fact and thus meets the Article III standing requirement imposed by Proposition 64, may pursue a false advertising class action under the UCL without having to prove each putative class member's reliance on a particular representation.

2. Reliance

In holding that Proposition 64 added an individual reliance element to the UCL, the appellate court attempted to rationalize its decision in Pfizer by attributing the requirement to the new "as a result of" language in the statutes. Pfizer, 45 Cal.Rptr.3d at 851-852, 141 Cal.App.4th 290. This holding failed to take into account precedent which would have dictated a result that is consistent with this Court's decision in Mervyn's.

In Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 197 Cal.Rptr. 783 , 673 P.2d 660, this Court expressly affirmed that a consumer fraud plaintiff may bring a class action ***without*** individualized proof of reliance. Id. at 219. Accordingly, this Court reversed the trial court's judgment to permit the plaintiffs to correct any uncertainty or lack of required specificity in their fraud causes of action. Id. at 221.

Moreover, in considering parallel language found in the same UCL section at issue here[2], this Court held that restitution is proper "in the absence of proof of lack of knowledge in order to deter future violations of the [UCL] and to foreclose retention by the violator of its ill-gotten gains." Fletcher v. Security Pac. Nat. Bank (1979) 23 Cal.3d 442, 449, 153 Cal.Rptr. 28, 591 P.2d 51. Clearly, the integrity of the substantive law requires that Proposition 64's "as a result of" language be interpreted in the same manner.

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[2] "The court may make such orders or judgments ...as may be necessary to prevent the use or employment by any person ... 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." Bus. & Prof. Code § 17535 [emphasis added]; *see also* Bus. & Prof. Code § 17204.

The Pfizer opinion's imposition of a reliance requirement into the UCL not only eviscerates any purpose that the UCL has independent of common law fraud [*see* Anunziato v. eMachines, Inc. (C.D. Cal. 2005) 402 F.Supp.2d 1133, 1138], it imposes a higher standard than that for fraud. Accordingly, the Pfizer opinion should not remain as precedent.

C. Pfizer Nullifies Express Language Contained in Proposition 64.

The appellate court in Pfizer improperly concluded that:

> [Proposition 64], which was promoted as adding a standing requirement to the UCL and FAL, has had the effect of dramatically restricting these consumer protection measures. For example, as the district court recognized in Anunziato, the addition of a reliance requirement may preclude a consumer who did not read and rely on a label from stating a UCL or FAL claim in a 'short weight' or 'short count' case. (Anunziato v. eMachines, Inc., *supra*, 402 F.Supp.2d at p. 1137.) However, this court must take the statutory language as it finds it.

Pfizer, 45 Cal.Rptr.3d at 853, 141 Cal.App.4th 290 [Footnote omitted]. The appellate court erred in this conclusion because it nullifies the express language in Proposition 64 that allows representative claims to be brought and ignores the voters' declared purpose in enacting the measure.

"In reviewing the statutory language, we reject an interpretation that would render particular terms mere surplusage, and instead seek to give significance to every word." Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 683, 38 Cal.Rptr.3d 36 [citing City of San Jose v. Superior Court (1993) 5 Cal.4th 47, 55, 19 Cal.Rptr.2d 73, 850 P.2d 62.] "It is [the court's] task to construe, not to amend, the statute. In the construction of a statute ... the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted." Id. at 684 [quoting California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal.4th 342, 349, 45 Cal.Rptr.2d 279, 902 P.2d 297.]

Further, it is a long-standing rule that:

> The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. In order to determine this intent, [the courts begin] by examining the language of the statute. But it is a settled principle of statutory interpretation that the language of the statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend. Thus, ***the intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.*** Finally, [the courts do] not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law which it is part so that the whole may be harmonized and retain effectiveness. [The courts] must also consider the object to be achieved and the evil to be prevented by the legislation. These guiding principles apply equally to the

interpretation of voter initiatives.

Horwich v. Superior Court (1999) 21 Cal.4th 272, 276, 87 Cal.Rptr.2d 222, 980 P.2d 927 [Citations and internal quotations omitted; emphasis added.].[3] ***"In the case of a voters' initiative statute, too, we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less."*** Hodges v. Superior Court (1999) 21 Cal.4th 109, 114, 86 Cal.Rptr.2d 884, 980 P.2d 433.

Proposition 64 expressly "[a]llow[s] any person [to] pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements [imposed by Proposition 64] and complies with Section 382 of the Code of Civil Procedure ..." Bus. & Prof. Code §§ 17203, 17535. The findings and declarations of purpose for the proposition further explain, "This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices." Proposition 64 §1(a). The findings also state, "It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to Chapter 5 (commencing with Section 17200) of Division 7 of the Business and Professions Code." Id. at §1(d). Notably, Proposition 64's text did ***not*** inform the voters that the proposition would drastically change the UCL's substantive elements by abolishing the well-settled and long-standing likelihood of deception standard and adding a reliance element akin to that for common law fraud.

If, however, the Pfizer opinion remains as precedent, the UCL's language that specifically allows class actions to be brought would be rendered "mere surplusage." *See* Colgan, 135 Cal.App.4th at 683, 38 Cal.Rptr.3d 36. In other words, without depublication, an affected plaintiff's ability to "pursue representative claims or relief on behalf of others" [*see* Bus. & Prof. Code §§ 17203, 17535] for false representations made by a defendant through mass media advertising campaigns would be nullified. Additionally, the voters' expressed intent to preserve the UCL as a consumer protection tool would be ignored and advertisers would have virtual immunity from their unfair and fraudulent practices.

D. The Appellate Court in Pfizer Disregarded the Compelling Rationale Adopted by the United States Supreme Court, the Ninth Circuit, and Other Consumer-oriented States in the Nation Which Have Consumer Protection Laws Analogous to the UCL.

The appellate court's holding in Pfizer that Proposition 64's "as a result of" language requires reliance and actual deception is also inconsistent with the interpretation of the "Little FTC Acts" of every major consumer-oriented state in the nation. These courts hold that, in spite of a statute's "as

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[3] *See also* People v. Canty (2004) 32 Cal.4th 1266, 1276-1277, 14 Cal.Rptr.3d 1, 90 P.3d 1168; In re Littlefield (1993) 5 Cal.4th 122, 130, 19 Cal.Rptr.2d 248, 851 P.2d 42; In re Lance W. (1985) 37 Cal.3d 873, 889, 210 Cal.Rptr. 631, 694 P.2d 744.

a result of" language, actual reliance and deception need not be shown or may be presumed in cases involving the FTC Act and "Little FTC Acts." In addition, these courts hold that a plaintiff may prove a violation if the defendant's practice is likely to deceive even when considering the phrase, "as a result of." Otherwise, in a day when companies send out advertising messages in the masses, advertisers would be effectively shielded from false advertising class actions if the named plaintiff was required to prove each putative class member's reliance on a particular representation.

1. FTC

Because California's UCL and the "Little FTC Acts" of individual states are patterned after the federal FTC Act [15 U.S.C. §45], decisions by federal courts construing the FTC Act are "more than ordinarily persuasive" in guiding California courts to construe the UCL. People *ex rel.* Mosk v. National Research Co. of Calif. (1962) 201 Cal.App.2d 765, 772-773, 20 Cal.Rptr. 516; *see also* Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 184, 83 Cal.Rptr.2d 548 [The California Supreme Court noted that, in devising a test under the UCL, courts may turn for guidance to the jurisprudence arising under the FTC Act.].

The U.S. Supreme Court explained the FTC Act's effect on the customs of the marketplace as follows:

> The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

FTC v. Standard Education Society (1937) 302 U.S. 112, 116, 58 S.Ct. 113, 82 L.Ed. 141.

The Ninth Circuit interpreted the FTC Act as follows:

> [The FTC Act] serves a public purpose by authorizing the Commission to seek redress on behalf of injured consumers. ***Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of the [FTC Act].*** [Citations omitted.] A presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product. [Citations omitted.]

FTC v. Figgie Int'l, Inc. (9th Cir. 1993) 994 F.2d 595, 605-606 [emphasis added]; *see also* FTC v. Cyberspace.com (9th Cir. 2006) — F.2d —, 2006 WL 1928496, *2 [A practice falls within the FTC

Act's prohibition of deceptive practices (1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material.]; Trans World Accounts, Inc. v. FTC (9th Cir. 1979) 594 F.2d 212, 214 [Proof of actual deception is unnecessary to establish a violation of the FTC Act. Misrepresentations are condemned if they possess a tendency to deceive.].

The guidance offered by the U.S. Supreme Court and Ninth Circuit with regard to the FTC Act applies equally to actions brought under California's UCL. Like the federal FTC Act, California's UCL serves a public purpose by authorizing a person "who has suffered an injury in fact and lost money or property as a result of [a UCL violation]" to seek redress on behalf of other consumers. Thus, as with the FTC Act, proof of actual reliance and deception for each putative class member is unnecessary to establish a UCL violation. To require such would thwart the effective prosecution of large consumer redress actions and frustrate the UCL's goals.

2. Cases Holding That Proof of Reliance and Deception Are Not Required for the "Little FTC Acts" of Individual States

Insofar as the language of a California statute is the same as that of another state, California courts generally give the same construction as the other states' courts. Erlich v. Municipal Court (1961) 55 Cal.2d 553, 558, 11 Cal.Rptr. 758, 360 P.2d 334. Below are just a few examples of states whose Little FTC Acts have the same "as a result of" language as the UCL.

Illinois

Illinois' Little FTC Act states, "Any person who suffers actual damage ***as a result of*** a violation of this Act committed by any other person may bring an action against such person." 815 ILCS 505/10a [emphasis added]. In interpreting this statute, both the Appellate Court of Illinois and United States District Court for the Northern District of Illinois held that there is no need to show reliance in a class action case brought under Illinois' Little FTC Act.

As held by the Illinois Appellate Court, questions pertaining to the exact circumstances of each class member's purchase and each class member's reliance on defendants' misrepresentation of its product do not mean that common questions do not predominate, as is required for class certification in an action against the seller of a product. Gordon v. Boden (1991) 224 Ill.App.3d 195, 201; 586 N.E.2d 461, 465.

The District Court further explained that, like California's UCL, Illinois' Little FTC Act "prohibits deceptive statements or omissions in consumer transactions and is intended to provide broader protection than common law fraud actions. [Citations.] Plaintiffs need not show they actually relied on or used due diligence in ascertaining the accuracy of misstatements, or that a defendant made misrepresentations in bad faith. [Citations.]" April v. Union Mortgage Co., Inc. (1989) 709 F.Supp. 809, 812. *See also* Celex Group, Inc. v. Executive Gallery, Inc. (Ill. 1995) 877 F.Supp. 1114, 1128 ["[T]he protection afforded by the Act is far broader than that afforded by the common law action for fraud ... Since the Act affords even broader consumer protection than

does the common law action of fraud, it is clear that a plaintiff suing under the Act need not establish all of the elements of fraud as the Act prohibits any deception of false promise"].

Accordingly, the "as a result of" language in Illinois' Little FTC Act does not require that reliance be individually shown for class action claims. Arenson v. Whitehall Convalescent and Nursing Home, Inc. (Ill. 1996) 164 F.R.D. 659, 666; *see also* Celex Group, 877 F.Supp. at 1128 ["actual reliance is not required"].

Michigan

Michigan's Little FTC Act states, "A person who suffers a loss ***as a result of*** a violation of this act may bring a class action on behalf of persons residing or injured in this state for the actual damages caused by the [violation]." Michigan M.C.L. §445.911(3) [emphasis added].

The Michigan Supreme Court recognized:

> The [Little FTC Act] was enacted to provide an enlarged remedy for consumers who are mulcted by deceptive business practices, and it specifically provides for the maintenance of class actions. [FN omitted.] This remedial provision of the [Little FTC Act] should be construed liberally to broaden the consumer's remedy, especially in situations involving consumer frauds affecting a large number of persons. [FN omitted.] ***We hold that members of a class proceeding under the [Little FTC Act] need not individually prove reliance on the alleged misrepresentations.*** [FN omitted.] It is sufficient if the class can establish that a reasonable person would have relied on the representations.

Dix v. American Bankers Life Assurance Co. of Florida (1987) 429 Mich. 410, 418; 415 N.W.2d 206, 209 [emphasis added]. Thus, Michigan courts hold that the"as a result of" language in its Little FTC Act does not require class members to individually prove reliance.

The Little FTC Acts of Alaska, Connecticut, Florida, Kentucky, Missouri, and New Mexico also contain the same "as a result of" language as the UCL.[4] In considering this language, these jurisdictions similarly found that proof of reliance by customers is not a necessary element for liability under those acts.[5]

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[4] *See* Alaska Stat. 45.50.531; Conn.Gen.Stat. §42-110g(a); Fla.Stat. §501.211(2); Mo. Rev. Stat. §407.025(1); N.M. Stat. §57-12-10(B).

[5] *See* State v. O'Neill Investigations, Inc. (Alaska 1980) 609 P.2d 520; Aurigemma v. Arco Petroleum. Prod. Co. (Conn. 1990) 734 F.Supp. 1025, 1029; Davis v. Powertel, Inc. (Fla. 2000) 776 So.2d 971; Telcom Directories, Inc. v. Com. ex rel. Cowan (Ky.App. 1991) 833 SW2d 848; State *ex rel.* Webster v. Areaco Inv. Co. (Mo.App. 1988) 756 S.W.2d 633, 635; Parker v. E.I. Dupont de Nemours & Co., Inc. (1995) 121 NM 120, 909 P.2d 1.

As evidenced by the above, the courts of every major consumer-oriented state in the nation follow the FTC's lead and hold that actual reliance and deception are ***not*** required under their state's "Little FTC Acts."[6] Because the appellate court in Pfizer disregarded the compelling rationale adopted by these courts and because the language of California's UCL has the same "as a result of" language, the Pfizer opinion should not be published.

III. CONCLUSION

California stands at a crossroads. If the Pfizer opinion remains as precedent, the imposition of substantive and insurmountable requirements of proof of individual reliance and injury on the part of every putative class member class will gut the UCL. It will destroy the only economically viable tool for redressing widespread deceptive advertising claims. In short, it will herald a return to the doctrine of *caveat emptor*.

Because this result is incompatible with the goals of California's consumer protection statutes, because the appellate court's construction of Proposition 64 is flawed, and because the voters did not intend to eviscerate the fraud prong of California's consumer protection statutes by approving Proposition 64, the Court should grant Mr. Galfano's request for depublication of the Pfizer decision.

Respectfully submitted,

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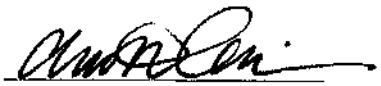
By: 
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STEVE GALFANO

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[6] *See also* Amato v. General Motors Corp. (1982) 11 Ohio App.3d 124, 126; 463 N.E.2d 625, wherein the Ohio Appellate Court concluded:

> In a day of mass media advertising hype intended to saturate the markets with inducements to purchase the heralded product, ***consumer claims would amount to little if acceptance of the representations made for the product could be manifested only by one-on-one proof of individual exposure. The implication of such a requirement is that a multiplicity of individual claims would have to be proven in separate lawsuits, or not at all.*** That consequence would result in the utter negation of the fundamental objectives of class-action procedure ... For these reasons proof of extensive advertising is sufficient to make a prima facie case for actual exposure.

Amato, 11 Ohio App.2d at 126-127; 463 N.E.2d at 628-629 [internal citations and footnotes omitted; emphasis added].