TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page

California Cases

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

Page

Other Cases

TABLE OF AUTHORITIES (cont'd)

Page

California Statutes and Rules

TABLE OF AUTHORITIES (cont'd)

Page

Other Statutes, Rules, and Constitutions

TABLE OF AUTHORITIES (cont'd)

Page

Treatises and Other Authorities

INTRODUCTION

Defendant Pfizer Inc. ("Defendant" or "Petitioner") is the manufacturer of Listerine mouthwash ("Listerine"). Beginning in or around June 2004, Defendant launched a national "Flossing Claim" advertising campaign, wherein Defendant represents and warrants to consumers that Listerine is "As Effective As Floss". [EXP 000121.]

As part of its "Flossing Claim" campaign, Defendant affixed shoulder labels on its Listerine bottles which contained the representation "As Effective As Floss". In addition, Defendant ran television commercials on countless national television and radio stations including, but not limited to, CNN, Good Morning America, and Fox News. Defendant also disseminated ads with such warranties and representations on its Listerine website and in newspapers of national or wide-spread circulation including USA Today, Time Magazine, Investors Business Daily, and The Washington Post. [EXP 00121, 123-125.]

In November or December of 2004, Plaintiff Steve Galfano ("Plaintiff") purchased a bottle of Listerine, manufactured by Defendant. Plaintiff testified that he was misled by Defendant's "As Effective As Floss" label and that he purchased the bottle of Listerine because it had such a label. Plaintiff explained, "it was an easy way to do what [he] should have been doing for a long time and flossing regularly." [EXP 00113-114.]

Plaintiff filed his action against Defendant alleging that Defendant violates the law through its advertising of Listerine in a manner that warrants that Listerine can replace the use of dental floss. [EXP 00041-70.] The trial court certified Plaintiff's case to proceed as a class action, finding substantial evidence to support each class certification

requirement for Plaintiff's claims. [EXP 0001-17.] Specifically, the trial court certified "a class of all persons who purchased Listerine, in California, from June 2004 through January 7, 2005." [EXP 00014.]

Defendant now files a petition for writ of mandate, seeking a directive from this Court to vacate the trial court's order certifying a class action.

WHY THE PETITION SHOULD BE DENIED

It is undisputed that the determination of whether to certify Plaintiff's case to proceed as a class action rests within the sound discretion of the trial court. See Sav-On Drug Stores, Inc. v. Superior Court (Rocher) (2004) 34 Cal.4th 319, 326-327 ["Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification."]; Reese v. Wal-Mart Stores, Inc. (1999) 73 Cal.App.4th 1225, 1233 ["[W]e will not substitute our judgment of the suitability of class treatment for that of the trial court, as long as the trial court applied the proper legal principles and assumptions, and the ruling is supported by substantial evidence."].

Defendant's petition for extraordinary relief must be denied unless it can demonstrate that the trial court ***abused*** its discretion. See State Farm Mut. Auto. Ins. Co. v. Superior Court (Corrick) (1956) 47 Cal.2d 428, 432; RLI Ins. Co. Group v. Superior Court (Calif. Dept. of Ins.) (1996) 51 Cal.App.4th 415, 433. A writ of mandate will not issue simply to "control" the exercise of judicial discretion. Robbins v. Superior Court (County of Sacramento) (1985) 38 Cal.3d 199, 205; Fisherman's Wharf Bay Cruise Corp. v. Superior Court (Blue & Gold Fleet, Inc.) (2003) 114 Cal.App.4th 309, 319. Mandate will lie only

where the trial court's exercise of discretion exceeded "all bounds of reason, all of the circumstances before it being considered". State Farm, *supra*, 47 Cal.2d at 432.

> "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification ... [Accordingly,] a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [citation]... 'Any valid pertinent reason stated will be sufficient to uphold the order.'"

Sav-On Drug Stores, *supra*, 34 Cal.4th at 326-327 [quoting Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435-436]; see also Quacchia v. DaimlerChrysler Corp. (2004) 122 Cal.App.4th 1442, 1447-1448. Any lesser standard would require appellate courts to review class certification determinations *de novo*, a clearly undesirable result.

As Plaintiff demonstrates in the facts and arguments to follow, Defendant has failed to demonstrate that the trial court abused its discretion in certifying Plaintiff's case to proceed as a class action. The trial court fully considered the applicable law and pertinent facts, balanced all relevant factors, and exercised its sound discretion to grant Plaintiff's motion for class certification. As explained below, every consideration relevant to the trial court's determination weighs heavily in Plaintiff's favor.

The five factors relevant to a determination of whether to certify a case to proceed as a class action are as follows: (1) numerosity, (2) ascertainability, (3) commonality, (4) typicality, (5) adequacy of representation, and (5) superiority. Plaintiff's case satisfies each of these factors.

First, the numerosity factor is easily satisfied in this litigation because Defendant stipulated that Plaintiff satisfied this criteria for purposes of class certification. [EXP 00143.]

Second, the ascertainability factor is satisfied because (1) the class, as defined, is temporally limited; (2) Plaintiff submitted declarations from various store representatives, which state that the stores can identify consumers who purchased Listerine and used their "club cards" to make their purchases; and (3) notice by publication could be accomplished under California Rules of Court, Rule 1856(e). [EXP 00014, 00145-154.]

Third, the commonality factor is satisfied as to each of Plaintiff's causes of action. With respect to the breach of express warranty claim, common questions of law and fact predominate among all class members because similar representations were made to all class members and individualized proof of reliance is not required. Similarly, with respect to Plaintiff's UCL claims, common questions of law and fact predominate because relief is available without individualized proof of reliance and deception.

Fourth, the typicality factor is satisfied because, Plaintiff, like other members of the class, purchased a Listerine bottle in California during the class period. [EXP 00113-114.]

Fifth, the adequacy of representation factor is satisfied because Plaintiff states that he will vigorously prosecute this case and believes that he has hired competent counsel to represent him and the class for the claims asserted in the complaint. Further, Plaintiff has been deposed and has propounded discovery in the case. [EXP 00108-117, 122-142.]

In short, the trial court's exercise of its discretion is supported by overwhelming evidence and should not be disturbed.

STATEMENT OF THE CASE

On January 21, 2005, Plaintiff filed an action against Defendant alleging that Defendant violates the law through its advertising of Listerine in a manner that warrants that Listerine can replace the use of dental floss. Plaintiff's complaint contains the following causes of action: (1) false advertising, pursuant to Business and Professions Code section 17500 *et seq*. ("Section 17500"); (2) unfair competition as a result of Defendant's unlawful, unfair, and fraudulent business practices, pursuant to Business and Professions Code section 17200 *et seq*. ("Section 17200"); and (3) breach of express warranty pursuant to Commercial Code section 2313. [EXP 00041-70.] [Section 17200 and Section 17500 shall collectively be referred to herein as the "UCL".]

Section 17500 prohibits anyone from making statements that are "untrue or misleading, and that are known, or by the exercise of reasonable care should be known, to be untrue or misleading", in order to induce consumers into purchasing property or services. Bus. & Prof. Code § 17500.

Section 17200 prohibits "any unlawful, unfair, or fraudulent business acts or practices", including deceptive or misleading advertising prohibited pursuant to section 17500. Bus. & Prof. Code § 17200.

Commercial Code section 2313 provides, in relevant part, as follows:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. Such promises and affirmations of fact constitute express warranties.

Com. Code § 2313.

On November 22, 2005, the trial court certified a class of all persons who purchased Listerine, in California, from June 2004 through January 7, 2005, finding substantial evidence to support each class certification requirement for Plaintiff's breach of express warranty and UCL claims. In finding that common questions of law and fact predominate on Plaintiff's UCL claims, the trial court relied on case law which holds that "California courts have repeatedly held that relief

under the UCL is available without individualized proof of deception, reliance and injury. [Citations.]" Massachusetts Mutual Life Ins. Co. v. Superior Ct. (2002) 97 Cal.App.4th 1282, 1288. [EXP 001-00017.]

On December 29, 2005, Defendant filed a petition for writ of mandate, seeking a directive from this Court to vacate the trial court's order certifying a class action.

LEGAL DISCUSSION

I. THE RESPONDENT COURT PROPERLY INTERPRETED PROPOSITION 64.

Proposition 64, which was approved by the voters in the November 2004 General Election, amended certain sections of the UCL. As relevant here, Proposition 64 specifically amended Business and Professions Code sections 17204 and 17535 to inject a standing requirement for actions under these related laws.

As so amended, Business and Professions Code section 17204 reads, in relevant part, as follows:

> Actions for any relief pursuant to this chapter shall be prosecuted exclusively ... by ... or upon the complaint of any board, officer, person, corporation or association or ***by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition***.

Bus. & Prof. Code § 17204 [emphasis added].[1]

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[1] Business and Professions Code section 17203 was also amended to read, in pertinent part, as follows:

> 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 ...

Similarly, amended Business and Professions Code section 17535 reads, in pertinent part, as follows:

> Actions for injunction under this section may be prosecuted by ... or upon the complaint of any board, officer, person, corporation or association or by any person ***who has suffered injury in fact and has lost money or property as a result of a violation of this chapter. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section and complies with Section 382 of the Code of Civil Procedure*** ...

Bus. & Prof. Code § 17535 [emphasis added].

These statutes, as amended, prevent unaffected plaintiffs from being able to file actions on behalf of the general public. Prior to Proposition 64, standing was granted to everyone without any claim that he or she had suffered any injury. Proposition 64 eliminated this so-called "unaffected plaintiff" standing. Under current law, only persons who have been injured in fact and have lost money as a result of the alleged unfair competition or false advertising have standing to bring actions for relief under the UCL. William L. Stern, Bus. & Prof. C. § 17200 Practice (2005), §§ 2:47:3-4.

Defendant bases a majority of its petition on the inaccurate assertion that the trial court committed legal error in interpreting Proposition 64 because it relied upon a pre-Proposition 64 case (i.e., Massachusetts Mutual, *supra*) to support its finding that common questions of fact and law predominate on Plaintiff's UCL claims. As explained below, contrary to Defendant's assertions, the UCL's substantive liability standards remain the same even after the passage

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Bus. & Prof. Code § 17203.

of Proposition 64.

A. The California Court of Appeal Continued to Apply the Ordinary "Likely to Deceive" Formulation in a Case That Was Filed after Proposition 64's Passage.

The California Court of Appeal, while acknowledging the UCL's new "injury in fact" requirement, has applied the same "likely to deceive" analysis in another post-Proposition 64 decision. See Progressive West Ins. Co. v. Superior Court (2005) 135 Cal.App.4th 263, 284-285, fn. 4-5.

In Progressive, plaintiff "Preciado alleged that [defendant] Progressive engaged in a pattern and practice of asserting its rights to 100 percent recovery of all moneys it pays to its insureds regardless of whether that reimbursement should be denied altogether or partially due to the made-whole rule and the common-fund doctrine. Further Preciado alleges that Progressive made material misrepresentations and misled him (and presumably each of its customers it makes these same demands upon as a matter of course) in this regard." Id. at 284-285.

In concluding that Progressive's demurrer was properly overruled, the Court of Appeal held that such "conduct is likely to deceive the public" [Id. at 285, fn. 4] and relied upon the following statement of law:

> 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***." [Pastoria v. Nationwide Ins. (2003) 112 Cal.App.4th 1490, 1498.] Stated another way, "In order to state a cause of action under the fraud prong of [section 17200] ***a plaintiff need not show that he or others were actually deceived*** or confused by the

> conduct or business practice in question. 'The "fraud" prong of [section 17200] is unlike common law fraud or deception. A violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. Instead, it is only necessary to show that members of the public are ***likely to be deceived***.' [Citations.]" [Schnall v. Hertz Corp. (2000) 78 Cal.App.4th 1144, 1167.]

Progressive, *supra*,135 Cal.App.4th at 284 [emphasis added].

Thus, as the case law above clearly demonstrates, Proposition 64 did not alter the UCL's substantive liability standard.

B. The United States District Court for the Central District of California Has Provided Well-Reasoned and Ample Reasoning Rejecting the Premise That Proposition 64 Adds a Reliance Element to the UCL.

The United States District Court for the Central District of California was also faced with the identical argument presented by Defendant in this case – namely, that "Proposition 64 imposes a reliance requirement on all private persons alleging a claim under the UCL [Unfair Competition Law, Bus. & Prof. Code § 17200,*et seq*.] and the FAL [False Advertising Law, Bus. & Prof. Code § 17500,*et seq*.]" See Anunziato v. eMachines, Inc. (2005) 402 F.Supp.2d 1133. Judge Selna of the Central District, however, "decline[d] to read a reliance requirement into the 'as a result of' language in either Section 17200 or Section 17500." Id. at 1139.

The court first noted that "reading reliance into the UCL and FAL would subvert the public protection aspects of those statutes" [Id. at 1137] and considered "numerous situations in which the addition of a reliance requirement would foreclose the opportunity of many

consumers to sue under the UCL and the FAL."[2] Id.

The court also noted that the UCL is distinct from other consumer protection statutes, such as the Consumer Legal Remedies Act, in that its remedies are limited to restitution. Id. [noting that there is a legitimate need for requiring reliance and causation where the plaintiff seeks monetary benefit (such as in cases like Caro v. Procter & Gamble Co. (1993) 18 Cal.App.4th 644; and Kavruck v. Blue Cross of Cal. (2003) 108 Cal.App.4th 773; which were relied upon by Defendant in opposing Plaintiff's class certification motion); however, that same need is not present in the UCL]. Based on the above, Judge Selna concluded:

> The goal of consumer protection is not advanced by eliminating large segments of the public from coverage under the UCL or the FAL where they suffer actual harm merely because they were inattentive or for one reason or another lacked the language skills to appreciate the particular unfair or false representation in issue. 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 FAL have independent of common law fraud***.
>
> The Court need not torture the language of the UCL and the FAC statutes to conclude that harm in fact will meet the "as a result of" requirement.

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[2] The court gave the illustration of the common "short count" claim. For example, under the UCL, if a box of cookies indicated that it contained twenty-four cookies, but was actually short, a consumer has a claim. But if actual reliance were required, a consumer who did not read the label and rely on the count for his or her purchase would be barred, despite the fact that the consumer was harmed as a result of the falsity of the representation. Id. at 1137-1138 (citing also the example of a father who sends his son in his place to purchase the box of cookies).

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> The Court finds that the remedial purposes of Proposition 64 are fully met without imposing requirements which go beyond actual injury. Significantly, none of the ballot materials which accompanied Proposition 64 – the California Attorney General's summary, the commentary prepared by the California Legislative Analyst's Office, or the arguments for and against the Proposition – mention reliance.

Id. at 1138 [emphasis added].

The court also declined to judicially expand the text of Proposition 64 beyond its declared intent to eliminate the filing of frivolous lawsuits and other shakedown schemes carried out by attorneys on behalf of an "unaffected plaintiff". Id. at 1138-1139 [citing Prop.64 §1(b) and (e)]. The element added by Proposition 64 was not to require reliance, but instead, to require an injury in fact under the standing requirements of the United States Constitution. Id.

Based on the foregoing, it is clear that California's UCL is unique in terms of its expansive coverage in consumer protection. This expansive coverage, however, is balanced by the limited remedies afforded, and now with the enactment of Proposition 64, by the injury in fact requirement. What Proposition 64 does ***not*** do, however, is undermine the UCL's uniquely expansive protection such that the statute becomes the functional equivalent of common law fraud. As the Anunziato case recognized, the imposition of a reliance requirement would have just that effect.

Thus, this Court should consider the fact that another tribunal considering the identical arguments raised by Defendant in this case uniformly rejected the imposition of reliance into the UCL.

C. California's Second Appellate District Has Repeatedly Applied the Traditional "Likely to Deceive" Standard When Discussing the Ucl in Cases Decided after Proposition 64.

While not specifically addressing the applicability of Proposition 64, California's Second Appellate District has applied the traditional "likely to deceive" standard when discussing the UCL in at least three cases decided and published after Proposition 64's passage.[3]

1. Wayne v. Staples, Inc.

Most recently, on January 4, 2006, the Second District reviewed *de novo* the issue of whether summary adjudication was properly granted as to a Section 17500 cause of action based upon a defendant's use of an allegedly deceptive parcel shipping form. See

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[3] A trial court's interpretation of a statute is reviewed *de novo*. Similarly, the application of a statutory standard to undisputed facts is reviewed *de novo*. Harustak v. Wilkins (2000) 84 Cal.App.4th 208, 212 (citing the California Supreme Court case of Crocker Nat'l Bank v. City & County of San Francisco (1989) 49 Cal.3d 881, 888, for the proposition that:

> If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination ***is reviewed independently***.) [Emphasis added.]

Thus, while some cases may have been initiated prior to the passage of Proposition 64, a Court of Appeal utilizing a *de novo* review was clearly not bound by the trial court's prior interpretation of the UCL or other underlying statute.

Wayne v. Staples, Inc. (2006) 135 Cal.App.4th 466.

In that case, defendant Staples offered "package shipping services to its customers through its agreement to serve as an authorized shipping outlet for United Parcel Service (UPS)". Id. at 471. Staples' shipping customers could "protect themselves from the loss or damage to their packages by purchasing insurance through UPS" called, "declared value coverage". Id. at 471-472. "UPS [charged] Staples $0.35 per $100 of declared value over $100 for the coverage", while Staples charged its customers twice that amount. Id. at 482. "Although the back page of Staples' parcel shipping order form notified its customers that Staples may place a surcharge on the coverage, it did not inform them its standard charge for the coverage included a 100 percent markup or margin." Id.

Plaintiff Wayne was "a Staples customer who shipped a package from a Staples store after he had purchased declared value coverage". Id. at 473. Wayne filed a putative class action complaint against Staples alleging that Staples violated Section 17500 by failing to properly disclose Staples' 100 percent profit or markup on the sale of declared value coverage on its parcel shipping order form. Id.

In analyzing the Section 17500 claim, Presiding Justice Perluss, writing for the Second Appellate District (Division 7), reaffirmed the following:

> To state a cause of action under consumer protection statutes designed to protect the public from misleading or deceptive advertising, the plaintiff must demonstrate that "'members of the public are ***likely to be deceived***.' [Citations.]"

Id. at 484 [emphasis added; citing Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211; Day v. AT & T

Corp. (1998) 63 Cal.App.4th 325, 331-332]. Thus, the Second Appellate District continued to apply the traditional "likely to deceive" formulation as recently as January of this year.

2. Colgan v. Leatherman Tool Group, Inc.

In January of this year, the Second Appellate District also reviewed *de novo* a trial court's finding in a class action case that a defendant tool manufacturer's representations violated the UCL. See Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663.

In Colgan, the plaintiff alleged that defendant Leatherman labeled and advertised that its products were "Made in U.S.A.", when in fact, a significant portion of the various parts of the products were manufactured outside the United States. In holding that Leatherman's "Made in U.S.A." representations were deceptive as a matter of law, Justice Mosk, writing for Division 5 of the Second District, applied the following rule of law:

> To prevail on a false advertising claim, a plaintiff need only show that members of the public are ***likely to be deceived***. [Freeman v. Time, Inc. (9th Cir. 1995) 68 F.3d 285, 289]; see Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1267 ["'members of the public are ***likely to be deceived***'" under section 17200]. A "***reasonable consumer***" standard applies when determining whether a given claim is misleading or deceptive. [Lavie v. Procter & Gamble Co. (2003) 105 Cal.App.4th 496, 512-513.] A "***reasonable consumer***" is "the ordinary consumer acting reasonably under the circumstances" [*ibid.*], and "is not versed in the art of inspecting and judging a product, in the process of its preparation or manufacture ..." [1A Callmann on Unfair Competition, Trademarks and Monopolies (4th ed. 2004), § 5:17, p. 5-103; see Lavie, *supra*, at pp. 504-512.]

Colgan, 135 Cal.App.4th at 682.

As shown by the above, the Second Appellate District again applied the traditional "likely to deceive" standard in another case decided after Proposition 64.

3. Bell v. Blue Cross of Cal.

The Second District of the California Court of Appeal also used the same "likely to deceive" analysis in a putative UCL class action case filed by emergency room physicians against a health care service plan, alleging that defendant Blue Cross reimbursed emergency care providers, who did not participate in the defendant's plan, at amounts substantially below the cost, value, and common range of services. See Bell v. Blue Cross of Cal. (2005) 131 Cal.App.4th 211.

In reversing a trial court's order sustaining the defendant's demurrer, Justice Vogel of the Second Appellate District (Division 1), wrote:

> 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, ***not whether there was actual deception***.

Id. at 221 [emphasis added; citing South Bay Chevrolet v. General Motors Acceptance Corp. (1999) 72 Cal.App.4th 861, 878, 883, fn. 18; Bank of the West, *supra*, 2 Cal.4th at 1267; Committee on Children's Television, Inc., *supra*, 35 Cal.3d at 211].

Therefore, the Second District, when faced with three cases in the post-Proposition 64 era, has consistently applied the ordinary "likely to deceive" formulation in analyzing the plaintiffs' UCL claims.

D. Imposing a Reliance Requirement into the UCL Would Create a Higher Standard than Even That for Common Law Fraud Because a Class Action May Be Brought for Fraud, Without Individualized Proof of Reliance.

The California Supreme Court has long recognized that a class action may be brought for fraud in cases with circumstances similar to those of this case. For example, in Vasquez v. Superior Ct. (1971) 4 Cal.3d 800, the California Supreme Court granted a writ, compelling a trial court to vacate its order sustaining demurrers and to allow the trial of the cause of action for ***fraud*** as a class action, holding that if the trial court finds that alleged misrepresentations made to the class members were material, at least an inference or rebuttable presumption of reliance would arise as to the entire class without direct testimony from each class member:

> The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence. "The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect."

Id. at 814 [quoting Hunter v. McKenzie (1925) 197 Cal. 176, 185].

> "Where representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be presumed that the representations were relied on." [12 Williston on Contracts (3d ed. 1970) 480.] This rule is in accord with the Restatement [Rest., Contracts, § 479, illus. 1.]."

Id.

Similarly, in Occidental Land, Inc. v. Superior Ct. (1976) 18 Cal.3d 355, the California Supreme Court affirmed a trial court's order refusing to decertify a class action for ***fraudulent representations***, holding that an inference of reliance may be established in a class action setting if a material false representation is made to persons whose subsequent acts were consistent with reliance upon the representation. Id. at 363.

The California Courts of Appeal has followed the Supreme Court's analysis in other cases. For instance, in National Solar Equip. Owners' Assn, Inc. v. Grumman Corp. (1991) 235 Cal.App.3d 1273, the Court of Appeal ordered the trial court to vacate its order denying class certification, holding that depositions of every class member would not be necessary in an action arising from an allegedly ***fraudulent*** solar equipment investment scheme.

In Danzig v. Superior Ct. (1978) 87 Cal.App.3d 604, the Court of Appeal held that if it appears on the face of the complaint that virtually all of the alleged ***fraudulent representations*** were contained in written material received by all members of the class, the questions of whether ***fraudulent representations*** were in fact made, and whether, if made, they were material, can be tried without having each absent class member give evidence on those questions. In other words, justifiable reliance may be established on a common basis without the taking of evidence from each class member. Id. at 613.

Also, in Metowski v. Traid Corp. (1972) 28 Cal.App.3d 332, the Court of Appeal reversed a trial court's order sustaining a demurrer to causes of action for breach of express warranty and fraud, holding that if the alleged misrepresentations were made in writing to each member of the class, and plaintiffs thereon entered into the contracts of

purchase as alleged, then a persuasive inference of reliance upon the representations arises without the necessity of testimony on that issue from each individual member of the class. Falsity of the representations can be proved as to all members of the class without calling them individually to testify, since proof of the allegations as to the quality and value of the product would be the same as to all. Id. at 337-338.

The Court of Appeal has also noted that "if defendant makes the representation to a particular class of persons, he is deemed to have deceived everyone in that class". Whiteley v. Philip Morris Inc. (2004) 117 Cal.App.4th 635, 381 [quoting Geernaert v. Mitchell (1995) 31 Cal.App.4th 601, 605].

As is clear from the case law above, California courts have repeatedly held that a class action may be brought for fraud, ***without*** individualized proof of reliance, if it is based upon the representations made by Defendant in written material received by all persons who purchased Defendant's product.

Here, Plaintiff's UCL causes of action are based upon the representations made in written material disseminated by Defendants and received by the public in California, including Plaintiff and all class members. Specifically, Defendant represented that Listerine is "As Effective As Floss" on the label of the Listerine bottles purchased by each class member. Complaint ¶¶ 1, 7, 9-11, 21 [EXP 00046-48, 50-51]. In support of Plaintiff's allegations, the evidence indeed shows that, during the class period, and as part of its "Flossing Claim" campaign, Defendant affixed shoulder labels on its Listerine bottles which contained the representation "As Effective As Floss". [EXP 00134-135].

Clearly, then, imposing a reliance requirement into the UCL would not only reduce the UCL to common law fraud and eviscerate any purpose that the UCL has independent of common law fraud [see Anunziato, *supra*, 402 F.Supp.2d at 1138], it would also impose a higher standard than that for a fraud class action based upon written representations received by all class members. Even in federal courts, where an Article III case or controversy is required, where false representations are made as to a material matter, an inference or presumption of reliance arises as to the entire class.[4] [See, *e.g.*, Biancur v. Hickey (N.D. Cal. 1997) 1997 WL 9857, *10-11; Knapp v. Gomez (S.D. Cal. 1991) 1991 WL 214172, *3; Carter, *et al.* v. United States of America (N.D. Cal. 1981) 1981 WL 1953, *11-12.]

For these reasons, this Court, like Divisions 1, 5, and 7 of the Second Appellate District; the Third Appellate District; and the Anunziato court, must also decline to read reliance and deception

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[4] While generally, in California, an unpublished opinion may not be cited or relied upon [see California Rules of Court, rule 977(a)], this case falls under the exception for decisions by courts of other jurisdictions. See California Rules of Court, rule 977(c); Lebrilla v. Farmers Group, Inc. (2004), 119 Cal.App.4th 1070, 1077. In Lebrilla it was noted that "In California an unpublished opinion may not be cited or relied upon. [Citations omitted.] However this rule applies only to opinions originating in California. Opinions from other jurisdictions can be cited without regard to their publication status." See also, Brown v. Franchise Tax Board (1987) 197 Cal.App.3d 300, 306 fn.6 [noting that, "The purpose of rule 977 is not to declare all unpublished cases anathema, but to preserve the effective operation of the 'selective publication rule' as it effects the courts of this state. (Citations omitted.) Unpublished decisions by the courts of other jurisdictions may be cited and considered for their persuasive value."] Since Biancur, Knapp, and Carter are from the federal district, they may be relied upon by this Court for their persuasive authority.

requirements into the UCL.

E. Requiring Individualized Poof of Reliance and Deception Would Nullify the Express Language in Proposition 64 That Allows Representative Claims to Be Brought.

"It is a settled principle in California law that when statutory language is clear and unambiguous there is no need for construction, and courts should not indulge in it." California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd. (2005) 128 Cal.App.4th 307, 312 [citing California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd. (2004) 117 Cal.App.4th 350, 355]. "Our first step [in determining the Legislatures' intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning." Colgan, *supra*, 135 Cal.App.4th at 683 [quoting California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 633; see Civil Code § 3542 ("Interpretation must be reasonable").]

"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." Id. [citing City of San Jose v. Superior Court (1993) 5 Cal.4th 47, 55.] "When the language of a statute is clear, we need go no further." Id. [quoting Nolan v. City of Anaheim (2004) 33 Cal.4th 335, 340.]

"It is our 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 ... We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms

used." Id. at 684 [quoting California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal.4th 342, 349.]

As explained by Judge Selna in Anunziato, *supra*, Proposition 64's declared intent was to eliminate the ***filing*** of frivolous lawsuits and other shakedown schemes carried out by attorneys on behalf of an "unaffected plaintiff". Anunziato, *supra*, 402 F.Supp.2d at 1138-1139 [emphasis added; citing Prop.64 § 1(b) and (e)]. Proposition 64 did ***not*** express in its words that a UCL class action may not be based upon a defendant's fraudulent business acts or practices or a defendant's deceptive or misleading advertising.

Rather, 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. If, however, this Court adopted Defendant's interpretation of Proposition 64 (i.e., that each class member must individually prove reliance and deception), the language of the UCL that specifically allows class actions to be brought would be rendered "mere surplusage". See Anunziato, *supra*, 135 Cal.App.4th at 683.

Pursuant to Colgan, *supra*, this Court must "instead seek to give significance to every word" [Anunziato at 683], including the express provisions allowing class actions, and decline Defendant's request to "insert what has been omitted or omit what has been inserted" [Anunziato at 684] "under the guise of construction" [Anunziato at 684]. To do otherwise would nullify an affected plaintiff's ability to "pursue representative claims or relief on behalf of others". [See Bus. & Prof. Code §§ 17203, 17535.]

F. The Fact That the Class Representative Satisfies Article III Standing Individually Is Sufficient to Confer the Right to Assert Issues That Are Common to the Class.

As explained above, Proposition 64 amended the UCL to require 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, *supra*, 402 F.Supp.2d at 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 [quoting In re VeriSign, Inc. (N.D.Cal. 2005) 2005 WL 88969, *4-5; internal quotations omitted]; see also Alba Conte & Herbert Newberg, Newberg on Class Actions (4th ed. 2002) § 2:5.

In Leapfrog, plaintiff "Parnassus purported to represent a class of investors who purchased LeapFrog stock" during a certain period of time, alleging that LeapFrog made fraudulent representations that increased the price of its stock. Id. at *1. The Leapfrog court concluded that, "[b]ecause Parnassus alleges that it relied on defendant's misrepresentations and purchased stock at an artificially

inflated rate [during the class period], [Parnassus] appears to have standing to assert claims on behalf of the class." Id. at *3.

The facts of this case are analogous to those of Leapfrog in that Plaintiff purchased a bottle of Listerine, during the class period and was misled by Defendant's "As Effective As Floss" label [EXP 00113-114]. In other words, Plaintiff has been injured in fact under the standing requirements of the United States Constitution and, thus, like the plaintiff in Leapfrog, has standing to assert claims on behalf of the class. As such, "there remains no further separate class standing requirement in the constitutional sense". See Id. at *3; 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)].

II. SUBSTANTIAL EVIDENCE SUPPORTS THE RESPONDENT COURT'S FINDING THAT COMMON ISSUES PREDOMINATE OVER INDIVIDUAL ISSUES.

The relevant inquiry with respect to the "commonality" factor is "whether there are issues common to the class as a whole *sufficient in importance* so that their adjudication on a class basis will benefit both the litigants and the court." Vasquez, *supra*, 4 Cal.3d at 811 (emphasis added). In deciding whether common questions "predominate", and whether a class action would be "superior" to individual lawsuits, the

Court will usually consider:

> (a) The interest of each member in controlling his or her own case personally;
>
> (b) The difficulties, if any, that are likely to be encountered in managing a class action;
>
> (c) The nature and extent of any litigation by individual class members already in progress involving the same controversy; and
>
> (d) The desirability of consolidating all claims in a single action before a single court.

California Practice Guide, Civil Procedure Before Trial, The Rutter Group, § 14:16 [citing FRCP 23(b)(3)].

A class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages. Vasquez, *supra*, 4 Cal.3d at 815-816; Sav-On Drug Stores, *supra*, 34 Cal.4th at 333-335.

"[A] reviewing court is not authorized to overturn a certification order merely because it finds the record evidence of predominance less than determinative or conclusive. The relevant question on review is whether such evidence is *substantial*." Sav-On Drug Stores, *supra*, 34 Cal.4th at 338 [emphasis in original].

A. Substantial Evidence Supports the Respondent Court's Certification of a Class on Plaintiff's UCL Claims.

1. The UCL Does Not Require Individualized Proof of Reliance and Deception.

Defendant inaccurately contends that the trial court abused its discretion in certifying a class on Plaintiff's UCL claims because Proposition 64 now requires each class member to present individual proof of reliance and deception. However, as explained above, Defendant's contentions are meritless. In fact, Defendant can offer no California case law to support its position that, since the enactment of Proposition 64, reliance and deception are now required to prove Plaintiff's UCL claims.

In actuality, Proposition 64 did ***not*** change well-established law which holds that a business practice is "fraudulent" within the meaning of the UCL if members of the public are "likely to be deceived". In other words, ***actual reliance and actual deception are irrelevant to Plaintiff's UCL claims***. See Wayne v. Staples, Inc. (2006) 135 Cal.App.4th 466, 484; Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 682; Bell v. Blue Cross of Cal. (2005) 131 Cal.App.4th 211, 221; Progressive West Ins. Co. v. Superior Court (2005) 135 Cal.App.4th 263, 284; Anunziato v. eMachines (2005) 402 F.Supp.2d 1133. Therefore, facts such as which representations, if any, were seen by class members, are ***immaterial*** to Plaintiff's UCL claims.[5]

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[5] Defendant's assertion also fails for another reason: As explained by the California Supreme Court, "If the factual circumstances underlying class members' claims differ, or if class

2. The Amount of Restitution Due to Each Class Member Can Be Resolved on a Class Basis.

Next, Defendant unconvincingly argues that an individual inquiry will be required to determine the amount of restitution due to each class member because the amount will be the difference between the value of the benefit the class member received and the price he or she paid. Defendant's position, however, is contrary to a very recent and significant decision issued by the Second Appellate District regarding what is required to prove restitution in a UCL class action case. See Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663.

By way of background, Justice Mosk, writing for the Second District (Division 5), explained that the UCL authorizes a trial court to grant restitution to private litigants asserting claims under those statutes. Id. at 694.

Business and Professions Code section 17203 expressly authorizes courts to make "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.

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members disagree as to the proper theory of liability, the trial judge, through use of techniques like subclassing or [other judicial] intervention, may incorporate the class differences into the litigative process, and give all class members their due in deciding what is the proper outcome of the litigation." Sav-On Drug Stores, *supra*, 34 Cal.4th at 340, fn. 13 [quoting Richmond v. Dart Industries (1981) 29 Cal.3d. 462, 473].

Business and Professions Code section 17535 similarly provides: "The court may make such orders ... 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 ... 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.

The Colgan court observed that restitution represents "the value of the property at the time of its improper acquisition, retention or disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value or additions have been made to it." Colgan, *supra*, 135 Cal.App.4th 669 [quoting Rest., Restitution, § 151, 598]. In the UCL context, the Court determined that,"the amount of restitution necessary to restore purchasers to the *status quo ante*" would include an expert's quantification of "either the dollar value of the consumer impact or the advantage realized by [the defendant]" as a result of its UCL violations. Id. at 700.

Thus, in this case, the amount of restitution due to each class member would be the same – i.e.,"either the dollar value of the consumer impact or the advantage realized" by Defendant as a result of its misleading "As Effective As Floss" representation. In other words, contrary to Defendant's argument, restitution can be resolved on a class basis.

B. Substantial Evidence Supports the Respondent Court's Certification of a Class on Plaintiff's Express Warranty Claim.

1. Plaintiff's Cause of Action for Breach of Warranty Does Not Require Individualized Proof of Reliance.

Defendant also contends that the trial court abused its discretion in certifying a class on Plaintiff's express warranty claim because reliance is a predominating individual issue. This contention, however, is contrary to overwhelming California law which holds otherwise.

First, Official Comment No. 3 to Commercial Code § 2313 clearly states that reliance is ***presumed*** and not an element of a claim for breach of express warranty:

> 3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. ***In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.*** Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

Com. Code § 2313, com. 3 (emphasis added).

Second, the Court of Appeal for the Second District has held that the reliance concept under Commercial Code § 2313 has been

abandoned:

> It is clear from the new language of this code section that the concept of reliance has been ***purposefully abandoned***. [Interco Inc. v. Randustrial Corp. (Mo.App. 1976) 533 S.W.2d 257, 261; see also Winston Industries, Inc. v. Stuyvesant Insurance Co., Inc. (1975) 55 Ala.App. 525 (317 So.2d 493, 497).] The change of the language in section 2313 of the California Uniform Commercial Code modifies both the degree of reliance and the burden of proof in express warranties under the code. The representation need only be part of the basis of the bargain, or merely a factor or consideration inducing the buyer to enter into the bargain. A warranty statement made by a seller is ***presumptively*** part of the basis of the bargain, and the burden is on the seller to prove that the resulting bargain does not rest at all on the representation.

Keith v. Buchanan (1985) 173 Cal.App.3d 13, 23 [citations in original; emphasis added].

Third, the California Supreme Court has also held that no particular reliance must be shown in connection with a claim for breach of express warranty under Commercial Code section 2313:

> The key under this section is that the seller's statements - whether fact or opinion - must become "part of the basis of the bargain." [Footnote and citations omitted.] The basis of the bargain requirement represents a significant change in the law of warranties. Whereas ***plaintiffs in the past have had to prove their reliance*** upon specific promises made by the seller [citation omitted], ***the Uniform Commercial Code requires no such proof***."

Hauter v. Zogarts (1975) 14 Cal.3d 104, 115.

Thus, from the official comments of the California Uniform Commercial Code, to the Second Appellate District, to the Supreme Court, reliance is not an element of Plaintiff's cause of action for breach of express warranty. For Defendant to suggest otherwise is improper and misleading. This is especially true in this case since Plaintiff's

breach of warranty claim is based on the fact that Defendant's representations were made on the shoulder labels affixed to the Listerine bottles purchased by each class member. [EXP 00046-48, 50-51, 00134-135.]

2. The Amount of Damages Due to Each Class Member Can Be Resolved on a Class Basis.

Defendant then asserts that the trial court abused its discretion in finding that common questions predominate for Plaintiff's breach of warranty claim because the damage determination for each class member is individualized. Defendant is again incorrect.

For breach of warranty claims, the damages available include "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted". Com. Code § 2714(2). Thus, in this case, the measure of damages is the difference between (1) the value of the Listerine accepted by Plaintiff and each member of the class, and (2) the value of Listerine plus the price of floss, since Defendant warranted that the use of Listerine can replace the use of dental floss in reducing, among other things, plaque and gingivitis. [EXP 00041-70.]

As a result, each member's right to recover damages is not an individual issue that predominates over the issues common to the class as a whole. See Vasquez, *supra*, 4 Cal.3d at 811 [class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages]; City of San Jose, *supra*, 12 Cal.3d at 459. Instead, the amount of damages due to each class member can be resolved on a class basis.

3. Affirmative Defenses

Defendant next attempts to argue that defenses such as consent, waiver, and estoppel also raise individual issues that preclude class certification.

However, as explained by the California Supreme Court in Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, Defendant bears the burden of proving its own affirmative defenses. Id. at 338. Were the Court to require, as a prerequisite to certification, an assessment of Defendant's affirmative defenses against every class member's claim, the Court effectively would reverse that burden. Id. at 337-338. Thus, Defendant's affirmative defenses do not defeat class certification because to suggest otherwise would pose an undue burden on Plaintiff.

Regardless, since actual reliance and deception are not required to prove Plaintiff's UCL claims, it necessarily follows that such defenses are likewise inapplicable.

C. Caro Is Distinguishable from the Present Case.

Defendant argues that the Court of Appeal in Caro v. Procter & Gamble Co. (1993) 18 Cal.App.4th 644, affirmed an order denying class certification on facts similar to those here. What Defendant fails to mention, however, is that the Caro court's discussion of the commonality factor focused on the Consumer Legal Remedies Act ("CLRA"), rather than the UCL. Caro, *supra*, 18 Cal.App.4th at 666-669.

The importance of this distinction was explained by the Anunziato court, *supra*, where Judge Selna stated the following:

> Caro and Wilens are distinguishable from the present case. Both arise under the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code 1780, *et seq.*, not the UCL or the FAL [False Advertising Law, Bus. & Prof. Code § 17500 *et seq.*], and there are several reasons for declining to import the CLRA's reliance requirement. First, the statutes have significant structural differences. The CLRA lists twenty-three distinct practices which are actionable. Cal. Civ. Code § 1770(a). By contrast, the UCL broadly proscribes "unfair competition," and the FAL is equally broad in its proscription of "untrue or misleading" statements in advertising. Second, the remedies are different. A plaintiff suing under the CLRA may recover actual and punitive damages; those remedies are denied under both the UCL and the FAL. *Compare* Cal. Civ. Code § 1780(a)(1), (4) *with* Cal. Bus. & Prof. Code §§ 17205, 17500. It does not follow that the limitations on one statute ought to, or need to, be read into the other. Said another way, there is a legitimate basis for requiring reliance and causation where the plaintiff seeks monetary benefit. The same need does not exist when the principal benefit of statutory enforcement, even when undertaken by a single individual non-class representative, is protection of the public.

Anunziato, *supra*, 402 F.Supp.2d at 1137.

Similarly, in holding that a trial court did not err in determining that a plaintiff's UCL claim satisfied the commonality factor for the purpose of class certification, the California Court of Appeal also stated "[N]othing we said in Caro undermines the general rule permitting common reliance where material misstatements have been made to a class of plaintiffs. Rather, our holding in Caro merely stands for the self-evident proposition that such an inference will not arise where the record will not permit it." Massachusetts Mut., *supra*, 97 Cal.App.4th at

1294.

Accordingly, Caro lends no precedential value to the present case because an inference of reliance arises from the fact that Defendant made its "As Effective As Floss" representations on the shoulder labels affixed to each Listerine bottle purchased by class members. [EXP 00046-48, 50-51, 134-135.]

D. The Decision and Order from the New York Trial Court in Whalen Are of No Value in this Case Because the Statute That the New York Case Was Based upon Is Distinguishable from the Statutes at Issue in Plaintiff's Case.

In the hopes of swaying this Court to adopt a decision made by a New York trial court, Defendant continually references the New York trial court's order denying class certification in Whalen v. Pfizer Inc., Index No. 600125/05 (N.Y. Sup. Ct. September 28, 2005). However, that trial court's decision lends no value to the determination of class certification in this case because the statute relied upon by the New York plaintiff is materially different from the statutes at issue here.

As explained above, Plaintiff's causes of action do ***not*** require individualized proof of reliance or deception. [See Sections I and II.B, *infra*.] In contrast, as explained by the New York trial court, "to prevail on a cause of action under GBL § 349, the plaintiff must show ... that s/he was deceived by [the] false statements or omissions ..." [EXP 01446.] The New York trial court also explained, "to assert a GBL § 349 claim, a plaintiff must allege that s/he was *exposed* to the alleged misrepresentations." [EXP 01447.] In other words, the standard adopted in New York is more burdensome than the common law fraud standard in California.

Accordingly, that one New York trial court decided not to certify a case against Defendant has no bearing on a California case which involves different causes of action with different prerequisites of proof.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE RESPONDENT COURT'S FINDING THAT PLAINTIFF'S CLAIMS ARE TYPICAL AND THAT PLAINTIFF IS AN ADEQUATE CLASS REPRESENTATIVE.

A. Typicality

Defendant next asserts that Plaintiff's claims are not typical of those alleged on behalf of the class because he testified that his experience may not be identical to other class members. However, to satisfy the typicality requirement, "[t]he purported representative's claim must be 'typical,' but ***not necessarily identical*** to the claims of other members." California Practice Guide, Civil Procedure Before Trial, The Rutter Group, § 14:43 (emphasis added). It is sufficient that the representative is *similarly situated*, so that he or she will have the *motive to litigate* on behalf of all class members. Classen v. Weller (1983) 145 Cal.App.3d 27, 45.

In other words, the fact that Plaintiff's experience may be different from that of other class members is not enough to defeat class certification. Plaintiff's claim is typical of the claims of the putative class members because, like the putative class members, he is a person in California who purchased Defendant's product.

Furthermore, since relief under the UCL is available without individualized proof of deception and reliance [see Section I, *infra*], the fact that Plaintiff made his purchase based on one particular "As Effective As Floss" label, rather than Defendant's commercials or the

other two labels, does not defeat typicality. A plaintiff need only show that a reasonable person is ***likely to be deceived*** by Defendant's representations. See Wayne v. Staples, Inc. (2006) 135 Cal.App.4th 466, 484; Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 682; Bell v. Blue Cross of Cal. (2005) 131 Cal.App.4th 211, 221; Progressive West Ins. Co. v. Superior Court (2005) 135 Cal.App.4th 263, 284; Anunziato v. eMachines (2005) 402 F.Supp.2d 1133.

Therefore, substantial evidence supports the trial court's finding that Plaintiff's claims are typical.

B. Adequacy of Representation

Defendant further asserts that Plaintiff is an inadequate class representative because his interest conflicts with those class members who, unlike Plaintiff, saw Defendant's "As Effective As Floss" representation on television commercials or the other labels. However, as stated above, because Plaintiff's causes of action do not require proof of actual reliance and deception [see Sections I and II.B, *infra*.], Defendant's argument misses the mark. [See also Footnote 5, *infra*.]

To be an adequate class representative, Plaintiff must "raise claims reasonably expected to be raised by the members of the class." City of San Jose, *supra*, 12 Cal.3d at 464. In this case, Plaintiff is an adequate class representative because he claims that Defendant misrepresented the effectiveness of Listerine on its labels and in its advertising. [EXP 00041-70.]

Additionally, Plaintiff made himself available for deposition and responded to and propounded discovery. He also testified that he purchased a bottle of Listerine mouthwash, which contained the

statement “As Effective As Floss”, in November or December of 2004. [EXP 00755-757, 759-760.]

Therefore, substantial evidence supports the trial court’s finding that Plaintiff adequately represents the class and protects the interests of the other members of the class since he pursues a course of action which benefits the class members.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE RESPONDENT COURT’S FINDING THAT CLASS TREATMENT WILL PROVIDE SUBSTANTIAL BENEFITS.

In deciding whether a class action would be “superior” to individual lawsuits, courts usually consider the factors under FRCP 23(b)(3). Basurco v. 21st Century Ins. Co. (2003) 108 Cal.App.4th 110, 121. “[S]uperiority must be looked at from the point of view [1] of the judicial system, [2] of the potential class members, [3] of the present plaintiff, [4] of the attorneys for the litigants, [5] of the public at large, and [6] of the defendant. The listing is not necessarily in order of importance of the respective interests ...” Schneider v. Vennard (1986) 183 Cal.App.3d 1340, 1347; Kamm v. California City Development Company (9th Cir. 1975) 509 F.2d 205, 212. Each of the superiority factors above weigh in favor of a finding of superiority.

A. The Present Action Serves The Interests Of The Judicial System.

No doubt exists that it is desirable to consolidate, in a single action before a single court, all the claims against Defendant for its unfair competition and breach of express warranty. Given that common questions of law and fact predominate, from a judicial standpoint, it is more efficient to handle these claims as a class action instead of

separate individual suits. If separate actions were to proceed, the resources and efforts of separate courts will unnecessarily be duplicated and wasted on the resolution of the same set of common questions.

B. Separate Lawsuits By Each Member Of The Class Would Create Substantial Prejudice To The Interests Of Other Class Members.

A class action is proper where separate lawsuits by each class member would impair the interest of other class members. FRCP 23(b)(1)(B). In this case, it may be that Defendant has limited funds from which numerous claimants may seek relief. Separate lawsuits might result in some claimants receiving more from a judgment to the prejudice of those claimants who later seek recovery. There is also a risk that inconsistent judgments may result due to each claimants' personal circumstances (*e.g.*, varying degrees of money, time, and motivation in which to prosecute a case), despite the fact that claimants share common issues of law and fact. A class action, on the other hand, will more equitably protect the interests of the class members since it will comprise everyone who might state a claim against Defendant on the same set of facts regarding Defendant's alleged misconduct. Thus, by utilizing the class action device, recovery for Plaintiff's UCL and breach of warranty causes of action can be adequately obtained.

C. Substantial Benefits Will Accrue To The Present Plaintiff.

The class device is particularly appropriate when numerous parties suffer injury in small amounts because individual lawsuits would

be uneconomical and the wrongdoer might otherwise escape liability. Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 716. As evidenced in prior cases, California courts have readily accepted and eagerly utilized the class action procedure to resolve multi-party controversies. For example, a unanimous Supreme Court decision remarked that:

> [T]he class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.

Richmond, *supra*, 29 Cal.3d. at 469.

In this case, the amounts in dispute, on an individual basis, are relatively small. Consequently, the loss to Plaintiff and each member of the class makes it economically unfeasible to pursue remedies other than as a class action and thus, there would be a failure of justice but for the maintenance of a class action.

Moreover, Plaintiff believes the proposed class action is the best way to proceed. Plaintiff believes that since his case requires the use of a lawyer insofar as it involves complex legal issues and requires discovery, which is not permissible in small claims court, he could not successfully proceed by way of a small claims action. [EXP 00108.]

Thus, substantial benefits will accrue to the present Plaintiff.

D. The Attorneys For The Litigants Will Not Encounter Difficulties In Managing This Class Action.

The litigants' attorneys are qualified to conduct the proposed litigation and hence, will not encounter any difficulties in managing this class action. [EXP 00118.]

E. Substantial Benefits Will Accrue To The Public At Large.

Class certification avoids duplicative litigation of the same issues regarding Defendant's representations and warranties that Listerine is "As Effective As Floss". To allow separate lawsuits by each member of the class would increase the burdens on already overburdened courts. In addition, multiple actions present no rational solution to Plaintiff's claims for restitution for Defendant's UCL violations or for damages for Defendant's breach of warranty, since the class action method is a viable, efficient, and economical procedure available to protect Class members' rights. Therefore, certification will yield substantial benefits to the public at large.

F. Separate Lawsuits By Each Member Of The Class Would Create Substantial Prejudice To Defendant.

A class action is justified where separate actions would create a risk of imposing incompatible standards of conduct on the party opposing the class through inconsistent judgments. FRCP 23(b)(1)(A). Separate lawsuits by each member of the class would create the risk that Defendant would be unable to act in response to separate judgments. Furthermore, additional litigation would require greater attorneys' resources and possibly higher attorney's fees. Clearly, separate lawsuits by each member of the class would create substantial prejudice to Defendant.

Thus, on balance, substantial evidence supports the trial court's finding that the superiority factor is satisfied.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE RESPONDENT COURT'S FINDING THAT THE CLASS IS ASCERTAINABLE.

Defendant asserts that the trial court abused its discretion in finding an ascertainable class because no means exist to "identify" potential class members. Defendant's assertion, however, directly contradicts California case law which holds otherwise.

A. The Absence of Records Determining Whether an Individual Is a Member of a Class Is Not Critical to Class Certification Issues.

While the class must be ascertainable, there is no need to specifically identify its individual members in order to bind them by the judgment. Weil & Brown, California Procedure Before Trial (2000) § 41:23. Although "[a]scertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata" [see Hicks v. Kaufman and Broad Home Corp. (2001) 89 Cal.App.4th 908, 914], "a plaintiff is not required [at the time of the class certification motion] to establish the existence and identity of class members." Reyes v. Board of Supervisors of San Diego County (1987) 196 Cal.App.3d 1263, 1274.

Furthermore, although records may aid in determining whether an individual is a member of a class, most cases suggest that the absence of such records is not determinative. For example, in Employment Development Dept. v. Superior Court (1981) 30 Cal.3d 256, the court addressed the public agency's defense that a lack of official records made it impossible to identify a significant portion of the certified class. The defendants argued that the state's destruction, pursuant to ordinary administrative procedures, of many of the pertinent official records would make it impossible to identify class members. Id.

at 266. Nonetheless, the reviewing court upheld the certification holding that "the trial court could properly conclude, however, that such destruction of records **should not** in itself automatically defeat the maintenance of a class action." Id. [emphasis added]. The court added that the defendants could raise specific objections to any remedial mechanisms that the trial court might fashion to cope with the problems posed by the absence of such records, but that its intervention at the certification stage of the proceedings was "clearly unwarranted." Id.

This holding was reiterated in Reyes v. San Diego County Bd. of Sup'rs (1987) 196 Cal.App.3d 1263, where the public agency had relevant records, but argued that the administrative costs associated with identification were so substantial as to render the comparable class benefits minimal. As a result, the public agency suggested that the class should not be certified. The court rejected the argument and also referred defendants to the firmly established principle that a plaintiff is not required at the certification stage of the proceedings to establish the existence and identity of class members. Id. at 1274 [citing Stephens v. Montgomery Ward & Co. (1987) 193 Cal.App.3d 411, 419; Collins v. Safeway Stores, Inc. (1986) 187 Cal.App.3d 62, 67-68; Lazar v. Hertz Corp. (1983) 143 Cal.App.3d 128, 138].

The Reyes court noted that the issue of whether sufficient means exist to identify class members is most relevant at the remedial stage and bears upon manageability. Id. at 1275. The court provided the following guidance:

> [A] court should not decline to certify a class simply because it is afraid that insurmountable problems may later appear at the remedy stage. But where the court finds, on the basis of substantial evidence...that there are serious problems *now appearing*, it should not certify the

> class merely on the assurance of counsel that some solution will be found. [citation omitted]. Consequently, unless the unmanageability of the class action is essentially without dispute or clearly established, it should not foreclose class certification.

Id.

Thus, any purported lack of records is not critical to certification issues.

B. Plaintiff Has Defined an Ascertainable Class.

In this case, the declarations of the retailers that were filed by Plaintiff in support of his class certification motion establish that they are able to identify the names, addresses, and telephone numbers of customers who purchased a particular item, so long as the customer purchased the item in connection with the retailer's reward program and the item had a UPC. [See EXP 00145-154.]

Moreover, for the purchasers who do not use such reward programs or whose identifying records are not complete or up to date, and for those retailers who do not have a reward program, subsection (e) of Rule 1856 of the California Rules of Court authorizes notice to the the general public of the pendency of a class action ***by means reasonably calculated to apprise class members, including, but not limited to, mass broadcasting of television and radio spots, publication in major newspapers and magazines, postings on the Internet, and/or distribution of information at relevant trade or retail franchises***. Rules of Court, Rule 1856(e). This manner of notice is appropriate if personal notification is unreasonably expensive, if the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally. Id.; Archibald

v. Cinerama (1976) 15 Cal.3d 853 [noting that "[T]he representative plaintiff in a California class action is not required to notify individually every readily ascertainable member of his class without regard to the feasibility of such notice; he need only provide meaningful notice in a form that should have a reasonable chance of reaching a substantial percentage of the class members"]; Cartt v. Superior Court (1975) 50 Cal.App.3d 960, 974.

Accordingly, substantial evidence supports that trial court's finding that an ascertainable class exists.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's petition for a writ of mandate.

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Respectfully submitted,

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CERTIFICATION

I, Christine C. Choi, an attorney at law duly admitted to practice before all the courts of the State of California and an associate of the law firm of Westrup Klick LLP, attorneys of record herein for plaintiff and real party in interest Steve Galfano, hereby certify that this document (including the memorandum of points and authorities headings, footnotes, and quotations, but excluding the tables of contents and authorities and this certification) complies with the limitations of Rule of Court 14(c) in that it is set in a proportionally-spaced 13-point typeface and contains 11,608 words as calculated using the word count function of WordPerfect.

By: _____
CHRISTINE C. CHOI