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

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION _____

PFIZER INC.,
Petitioner,
vs.
SUPERIOR COURT OF THE STATE OF CALIFORNIA, LOS ANGELES COUNTY,
Respondent,

STEVE GALFANO
Real Party in Interest.

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

PETITION FOR WRIT OF MANDATE

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WHY EXTRAORDINARY RELIEF IS NECESSARY

This petition for writ of mandate presents an unresolved and important legal issue regarding application to putative class actions of the requirement of Proposition 64 (which indisputably applies because it was enacted before this action was commenced). In particular, the principal issue presented by this writ is whether each member of the putative class asserting a claim under the Unfair Competition Law ("UCL") must, in the language of Proposition 64, prove that he "suffered *injury in fact*" *and* "lost money or property *as a result* of" the alleged deception. BUS. & PROF. CODE §17204 (emphasis added). In holding that this requirement of actual injury proximately caused by the alleged deception applies only to the named plaintiff and not to class members, the Respondent Court ignored black letter rules of statutory construction, and decisions interpreting the same or similar language in California Civil Code §1780(a) and other states' consumer fraud statutes. Significantly, the Court stated that this is an "open issue," that it "has not been decided," and "[w]e don't have any particular guidance on it." (Exhibits in Support of Petition pages ("EXP") 010, 039). Similarly, the Rutter Guide, which practitioners widely reference, advises that these are open issues. *See* Stern, BUS. & PROF.C. §17200 Practice ¶¶7.71-77, 7:144 (2005).

Inconsistently with its decision to certify a class action, and in

apparent recognition of the fact that it is not possible to prove proximate causation, injury and damages on a classwide basis, at the end of its decision the Respondent Court states that "the requirements of 'injury in fact' or 'lost money or property as a result' of the conduct of Defendant Pfizer, as imposed by Proposition 64, *may preclude recovery on a class basis*." (EXP 015) (emphasis added).

Wholly apart from these important questions of first impression, this writ should be granted because the decision below is contrary to several Supreme Court and Court of Appeal decisions denying class certification of 17200, express warranty and other claims where, as here, individual issues of liability, causation and/or damages predominate over any common issues. The ruling below is also contrary to the clear rule that it must be determined *at the time a class is certified* how these individual issues can be resolved manageably on a class-wide basis. *Lockheed Martin Corp. v. Super. Ct.*, 29 Cal.4th 1096, 1106 (2003); *Washington Mutual Bank v. Super. Ct.*, 24 Cal.4th 906, 927 (2001). Indeed, the Respondent Court, at the very time it certified a breach of warranty class, stated that the issue of reliance would be determined in "*subsequent proceedings*." (EXP 010) (emphasis added).

* * *

This is a putative statewide class action in which plaintiff alleges that petitioner-defendant Pfizer Inc. ("Pfizer") "creates a false impression that

Listerine [mouthrinse] can replace the use of dental floss in reducing plaque and gingivitis." (EXP 048 ¶12). In particular, plaintiff challenges three labels that appeared on some, but not all, Listerine bottles, and contained the statement: Listerine is "Clinically Proven" to be "As Effective As Floss Against Plaque and Gingivitis Between Teeth." Some of the labels also stated: "ask your dentist," "floss daily," and "not a replacement for floss." (EXP 856). Plaintiff also challenges four versions of the television commercials, even though *he did not base his purchase on any of the commercials*. None of the commercials ran simultaneously, and three of them expressly stated: "there's no replacement for floss" or "not a replacement for floss." (EXP 855-56, 867-71). Based on these allegations, plaintiff asserts claims under Sections 17200 and 17500 of the Business and Professions Code and for breach of express warranty.

Plaintiff conceded in his deposition that this case is replete with numerous factual issues that can only be determined upon individual inquiry of each class member. (*See* pp. 24-25, *infra*). These issues, which make clear that there is no "well-defined community of interest among the class members," *Lockheed*, 29 Cal.4th at 1104, include such key questions as (1) whether each member saw or read a label or commercial and, if so, (2) which label or commercial he saw and read, (3) whether he was deceived by the label or commercial and, if so, (4) whether that caused him

to buy Listerine and, if so, (5) whether, in the language of Proposition 64, he "suffered injury in fact" *and* "lost money or property as a result of" the deception, and, if so, (6) the amount of his "lost money," given the undisputed fact that prices vary widely and, as plaintiff conceded, most consumers will not have records of the price(s) they paid. Thus, a member may have purchased Listerine – not because of any alleged deception – but because, as with many consumers, he was brand loyal (*i.e.*, he purchased Listerine before, during and after the challenged advertising, often unaware of it). He may also have bought Listerine because he wanted a breath freshener, his dentist recommended it, due to a price promotion, or because he read the label's admonition to "floss daily" or "not a replacement for floss" and did *not*, in the words of plaintiff's complaint, take away any alleged "false *impression*" that Listerine could be used in place of floss to reduce plaque and gingivitis. (EXP 048) (emphasis added).

Each of these is an individual issue that cannot be resolved on a class-wide basis. It is undisputed that the only way to identify the persons who took away the alleged false implied message is by an individual inquiry of each class member. Indeed, in a consumer survey relied on in a related litigation, only 39% of those questioned about the first of the three Listerine labels stated that they "can use Listerine instead of floss," and when the results of the survey's "control cell" are factored in, the percentage who

took away this replacement message – which is the alleged "false impression" plaintiff alleges in this case – was only 17% (*i.e.*, 39%–22%). (EXP 703, 712). Similarly, when asked directly in the survey, 70% of consumers (92% when the control is factored in) did *not* take a way a replacement message from the third commercial. (EXP 688, 712).[1]

The Respondent Court did *not* disagree that an individual inquiry is needed to determine each of these facts. Rather, it stated that the issue of reliance for plaintiff's express warranty claim would be determined in "*subsequent proceedings*." (EXP 010) (emphasis added). As for the UCL claims, it held that the individual issues identified above have to be determined only for Mr. Galfano, and not for class members. *Id.* In so holding, the Court ignored Proposition 64's express language and, instead, relied on a *pre*-Proposition 64 case. *Id.* It also ignored the well-established law that the same substantive law applies to class members' claims as to the named plaintiff's. *See, e.g., City of San Jose v. Super. Ct.*, 12 Cal.3d 447, 462 (1974); *Collins v. Safeway Stores, Inc.*, 187 Cal.App.3d 62, 72 (1986). After all, the whole point of a class action is to adjudicate in one forum the class members' "individual" or "separate" "claims" on the theory that it would be more manageable than if they were "individually litigate[d]."

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[1] Storyboards of the commercials and copies of the three challenged labels appear at EXP 867-74.

Washington, 24 Cal.4th at 913; *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 435 (2000); *Weaver v. Pasadena Tournament of Roses Ass'n*, 32 Cal.2d 833, 838 (1948). To permit individuals who could *not* bring an individual action to recover as a *member* of a class action stands these cases on their heads. Finally, the Respondent Court ignored the undeniable fact that, as plaintiff conceded, he can only testify as to his own experiences, and it is only by speaking to *each* class member that the relevant facts about a particular class member's claim can be determined. (EXP 762-64, 777, 779-80, 782-83).

There are no reported state court decisions interpreting Proposition 64's express requirement that a plaintiff must prove that he "suffered *injury in fact and* lost money or property *as a result* of" the alleged deception – a requirement that is clear on its face. *See Cal. Ins. Guarantee Ass'n v. Workers' Compensation Appeals Bd.*, 128 Cal.App.4th 307, 316 (2005) (where "statutory language is clear and unambiguous, its plain meaning must prevail"); *People v. Foreman*, 126 Cal.App.4th 338, 342 (2005) ("'same principles that govern the construction of a statute'" apply to statutes enacted by citizen propositions). Nor are there any reported state court decisions applying this statutory requirement in class actions. Significantly, in interpreting the Civil Legal Remedies Act's identical language – that only a consumer "who suffers any damage[s] *as a result of* the use of a

[prohibited] method, act or practice" "may bring an action," CAL. CIV. CODE §1780(a) (emphasis added) – the Court of Appeal held that "[r]elief under the CLRA is specifically limited to those who suffer damage, making 'causation' a necessary element of proof." *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal.App.4th 746, 754 (2003) (affirming class certification denial).

Moreover, contrary to the Respondent Court's ruling, numerous courts in other states having consumer fraud statutes with identical "as a result" of language have held – in individual actions or in denying class certification – that the plaintiff must establish that he saw the offending ad, the ad deceived him, and the deception proximately caused him injury in fact.[2] Indeed, in *Whalen v. Pfizer Inc.* – which plaintiff concedes "chal-

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[2] *See, e.g.*, *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 160, 163-64 (Ill. 2002) (interpreting 815 ILCS 505/10a); *Hall v. Walter*, 969 P.2d 224, 235 (Col. 1998) (COL. REV. STAT. TIT. 6 §1-113(1)(a)); *Collins v. Anthem Health Plans, Inc.*, 880 A.2d 106, 120 (Conn. 2005) (CONN. GEN STAT. §42-110b); *Captain & Co. v. Stenberg*, 505 N.E.2d 88, 98 (Ind. Ct. App. 1987) (BURNS IND. CODE ANN. §24-5-0.5-4); *Macias v. HBC of Fla., Inc.*, 694 So.2d 88, 90 (Fla. 3d DCA 1997) (FLA. STAT. §501.211(2)); *Vickers v. Interstate Dodge*, 882 So.2d 1236, 1244 (La. Ct. App. 2004) (LA. REV. STAT. §51:1409(A)); *State v. Weinschenk*, 868 A.2d 200, 209 (Me. 2005) (5 ME. REV. STAT. §213); *Fink v. Ricoh Corp.*, 839 A.2d 942, 955-58 (N.J. Super. Ct. 2003) (N.J. STAT. ANN. §56:8-19); *Feitler v. Animation Celection, Inc.* 13 P.3d 1044, 1047 (Or. Ct. App. 2000) (OR. REV. STAT. §646.638); *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001) (73 PA. STAT. §201-9.2); *Fields v. Yarborough Ford, Inc.*, 414 S.E.2d 164, 166 (S.C. Super. Ct. 1992) (S.C. CODE ANN. §39-5-140); (continued...)

lenge[d] the same advertising on behalf of putative classes from consumers from [New York]" and "present[ed] essentially the same issues as those present in this action" – the Court interpreted New York's General Business Law, which is similar to Proposition 64, and *denied* the plaintiff's class certification motion precisely because, *inter alia*, individual facts of deception, injury and causation did not predominate. (EXP 080, 1442-55).

The Respondent Court's ruling is also contrary to numerous California decisions holding that where, as here, there are individual issues of fact of liability, injury and/or damages that predominate over any common issues in 17200 or express warranty cases, a consumer class may not be certified. *See, e.g., Weaver*, 32 Cal.2d at 839; *Quacchia v. DaimlerChrysler Corp.*, 122 Cal.App.4th 1442, 1450 (2004); *Osborne v. Subaru of Am., Inc.*, 198 Cal.App.3d 646, 661 (1988); *Collins*, 187 Cal.App.3d at 73; *Baltimore Football Club, Inc. v. Super. Ct.*, 171 Cal.App.3d 352, 362 (1985). Thus, for example, in *Caro v. Procter & Gamble Co.*, 18 Cal.App.4th 644, 655 (1993), the Court affirmed denial of certification of UCL and express warranty claims where plaintiff alleged that defendant falsely advertised its orange juice as "fresh." The Court held individual questions predominated

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[2] (...continued)
Land v. Dixon, 2005 Tenn. App. LEXIS 401, *12 (Tenn. App. Ct. July 12, 2005) (TENN. CODE. ANN. §47-18-109(a)(1)); *Lambert v. Downtown Garage, Inc.*, 1997 Va. Cir. LEXIS 457, *5-6 (Va. Cir. Ct. Nov. 25, 1977) (VA. CODE ANN. §59.1-204).

because whether "class members believed the juice was 'fresh' would be a matter of individual proof." *Id.* at 668. That is the precisely the case here where it cannot be assumed that *each* class member was actually deceived because, without asking him or her, it is not possible to determine what message he or she took away from the commercial or label (assuming he saw one of the challenged commercials and/or purchased a bottle with a challenged label and read the label).

In addition, the Respondent Court's failure to determine *how* the individual issues of liability, causation and damages could be resolved manageably on a class-wide basis – instead postponing that decision until "the development of the evidence in subsequent phases of the litigation" (EXP 014-15) – conflicts with the clear law that the court must make that determination *at the time it certifies a class*. *Washington*, 24 Cal.4th at 927; *Lockheed*, 29 Cal.4th at 1106. As the Texas Supreme Court held in rejecting such a "certify now and worry later" approach, "[i]f it is not determinable *from the outset* that the individual issues can be considered in a manageable, time-efficient, yet fair manner," consistent with the defendant's due process right to notice of the class members' individual claims and to cross-examine and offer evidence, "then certification is not appropriate." *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 435-38 (Tex. 2000) (emphasis added).

Time and again, the Supreme Court and the Court of Appeal have issued writs of mandate to reverse an order certifying a class or denying a motion to decertify a class or to strike class allegations. *Blue Chip Stamps v. Super. Ct.*, 18 Cal.3d 381, 387 & n.4 (1976); *Lockheed*, 29 Cal.4th at 1108; *Washington*, 24 Cal.4th at 929 (2001).[3] Indeed, in *San Jose*, the Supreme Court issued a writ of mandate directly to the Superior Court vacating the lower court's class certification order. 12 Cal.3d at 465.

That "[a]n intermediate order concerning class certification . . . is appropriately challenged by mandate before proceedings take place on the merits"[4] flows from the Supreme Court's recognition in *Blue Chip Stamps* that a defendant has "no adequate remedy by appeal from final judgment":

> Delaying review until final judgment – while the trial court attempts to manage the unmanageable – would mean that the parties could not obtain appellate review until after they had paid the great costs which render the damage action inappropriate. Thus, appeal from a final judgment is not a practical remedy. (18 Cal.3d at 387 n.4).

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[3] *See also, e.g., Global Minerals & Metals Corp. v. Super. Ct.*, 113 Cal.App.4th 836 (2003); *J.P. Morgan & Co. v. Super. Ct.*, 113 Cal.App.4th 195 (2003); *Canon U.S.A., Inc. v. Super. Ct.*, 68 Cal.App.4th 1 (1998); *Am. Suzuki Motor Corp. v. Super. Ct.*, 37 Cal.App.4th 1291, 1299 (1995); *Carabini v. Super. Ct.*, 26 Cal.App.4th 239; *Baltimore Football Club*, 171 Cal.App.3d 352; *Apple Computer, Inc. v. Super. Ct.*, 126 Cal.App.4th 1253, 1264 (2005) (writ of mandate granted where conflicts of interest "raise[d] important questions about the rights of putative class members").

[4] *Dean Witter Reynolds, Inc. v. Super. Ct.*, 211 Cal.App.3d 758, 763 (1989).

These reasons for granting a writ fully apply here. Given the number and unmanageability of individual questions of liability, causation and damages, it "is not a practical remedy" to make the parties expend the tremendous time, effort and cost of a class litigation before this Court can address the manifest error of the Respondent Court's certification order. *Id.* at 387 n.4.

Moreover, the issues of which Pfizer seeks review satisfy many of the criteria the Supreme Court and Court of Appeal have recognized as a basis for granting a writ of mandate. The issues here are "of widespread interest" and involve "significant issues of first impression that are likely to arise repeatedly," "a newly enacted statute that has not yet been interpreted or applied by any appellate court," and "conflicting . . . interpretations of the law" that "require a resolution"; and "the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case." *Edamerica, Inc. v. Super. Ct.*, 114 Cal.App.4th 819, 823 (2003); *Volkswagen of Am., Inc. v. Super. Ct.*, 94 Cal.App.4th 695, 702 (2001); *Smith v. Super. Ct.*, 41 Cal.App.4th 1014, 1020 (1996); *Omaha Indemnity Co. v. Super. Ct.*, 209 Cal.App.3d 1266, 1273-74 (1989).[5]

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[5] *See also Cianci v. Super. Ct.*, 40 Cal.3d 903, 908 (1985); *Williamson v. Super. Ct.*, 21 Cal.3d 829, 833 (1978); *Cryolife, Inc. v. Super. Ct.*, 110 Cal.App.4th 1145, 1151 (2003); *Marron v. Super. Ct.*, 108 Cal.App.4th 1049, 1056 (2003).

PETITION

By this verified petition, petitioner-defendant Pfizer alleges and shows:

1. Petitioner, a Delaware corporation with its principal place of business in New York, is a defendant in an action now pending in the Respondent Court entitled *Steve Galfano v. Pfizer Inc.*, Los Angeles County, Superior Court Case No. BC 327114. Real party in interest Steve Galfano is the plaintiff in this action and a resident of Los Angeles County.

2. Plaintiff alleges in his complaint that in television commercials, labeling and other advertising Pfizer "creates a false impression that Listerine can replace the use of dental floss in reducing plaque and gingivitis." (EXP 047-48). Before he made his Listerine purchase, plaintiff used floss about "once a month," although he believes one has to floss "a couple [of] times a week" to get floss' benefits. (EXP 747-78, 752). He testified that he made one Listerine purchase, but does not recall how much he paid and he has no receipt. (EXP 755-56, 759, 794-95). He bought Listerine due to the bottle's red label, which he recalled said "as effective as floss," but did not recall what else the label said, and testified unequivocally that he did *not* make his purchase based on any television or other ad. (EXP 759-61).

3. Plaintiff commenced this action on January 21, 2005, seeking

to represent a class of "[a]ll persons who purchased Listerine, in California, from approximately June of 2004 to the date of judgment in this action." (EXP 049).

4. After discovery, on September 9, plaintiff moved for certification of a class limited to only those persons who purchased Listerine bottles with any of the three challenged labels. (EXP 094). In support of his motion, plaintiff rested on conclusory allegations and references to the preliminary injunction decision in *McNeil-PPC, Inc. v. Pfizer Inc.*, 351 F. Supp.2d 226 (S.D.N.Y. 2005), which was not a consumer class action decision. (EXP 095). In *McNeil*, when asked directly in a survey, 70% of consumers (92% when the survey's control is factored in) were *not* misled by the Listerine label Mr. Galfano saw. (EXP 703, 712).[6]

5. After briefing, the Respondent Court heard oral argument on November 10, 2005, on plaintiff's class certification motion. A copy of the

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[6] Five months before plaintiff moved for certification, Pfizer agreed in *McNeil* to a consent order providing that it could not make the "as effective" claim unless it "possesses and relies upon competent and reliable scientific evidence that substantiates the claim." (EXP 852 ¶3). The order states that Pfizer is not prohibited from using the clinical studies on which the claim was based "to support the claim that Listerine fights plaque and gingivitis." (*Id.* ¶1). Consistent with Pfizer's express "den[ial of] each and every allegation asserted in the complaint," the order further provides that nothing in it "shall be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by Pfizer or of the truth of any of the claims or allegations alleged in the complaint." (EXP 850-51 ¶2).

hearing transcript is found at EXP 018-40.

6. On November 22, 2005, the Court issued its opinion, granting plaintiff's motion. A copy of the opinion is found at EXP 004-15. The Court ignored that plaintiff – who saw only one of the three challenged labels and testified that he did *not* make his purchase based on any commercial – narrowed the proposed class definition in his motion to just those who purchased a Listerine bottle with a challenged label. (*See* pp. 12-13 ¶3, *supra*). Instead, it certified the broader class alleged in the complaint: "all persons who purchased Listerine, in California, from June 2004 through January 7, 2005." (EXP 014).

7. On the key issue of whether common issues predominated over individual issues, the Court acknowledged that to succeed on the express warranty claim, reliance on the alleged express warranty must be shown, but stated that the determination of reliance "must be preserved for subsequent proceedings." (EXP 010). With respect to the UCL claims, the Court, acknowledging that it was an "open issue" on which "guidance" was needed, held that Proposition 64's injury and causation requirements applied only to plaintiff and not to the absent class members. (EXP 010, 039). On that basis, the Court found common issues predominated on the UCL claims. (EXP 010).

8. Nevertheless, at the end of its opinion, the Court, stating that

the individual issues would have to be determined in some unspecified way at some unspecified time, expressed its "reservations" and "concerns" that these issues could ever be determined "on a class basis" or that the class members could ever establish the right to any meaningful relief:

> Notwithstanding the Court's order certifying the class on each cause of action, the Court has reservations concerning the remedies available to the class. Specifically, upon proof of false or misleading advertising, or of a fraudulent or unfair practice, injunctive relief may be available. However, *any restitutionary relief may be problematic.* Insofar as the advertising and labeling is no longer in use, *injunctive relief may not be appropriate.* With respect to restitutionary relief, the requirements of "injury in fact" or "lost money or property as a result" of the conduct of Defendant Pfizer, as imposed by Proposition 64, *may preclude recovery on a class basis.* Similarly, proof of the claim for restitutionary disgorgement *appears problematic*, to the extent there must be some correlation between the amount of restitutionary relief and conduct justifying recovery. The Court further has *reservations* with respect to the remedies on Plaintiff's breach of warranty claim, as the measure of damages is defined under Commercial Code §2714(2). (EXP 015) (emphasis added).

9. Petitioner has no adequate remedy at law. In the words of the Supreme Court in *Blue Chip Stamps,* "[d]elaying review until final judgment – while the trial court attempts to manage the unmanageable – would mean that [Pfizer] could not obtain appellate review until after [it] had paid the great costs which render the damage action inappropriate." 18 Cal.3d at 387 n.4. *See City of Oakland v. Super. Ct.*, 45 Cal.App.4th 740, 750-52 (1996) ("substantial trial expenses" being "needlessly imposed" is factor "tend[ing] to make later review on appeal an inadequate remedy."); *Sierra*

Breeze v. Super. Ct., 86 Cal.App.3d 102, 104 n.2 (1978) (court may properly grant writ of mandate because denial "will subject [petitioner] to a long jury trial with attendant expenses."); *Whitney's at the Beach v. Super. Ct.*, 3 Cal.App.3d 258, 266 (1970) ("merit of avoiding unnecessary trials" by "entertaining the writ" appears "to outweigh the burden placed on the appellate court"). Moreover, if the writ is denied, Pfizer will have no remedy other than appeal of a final disposition of this action. By then, Pfizer and California residents, taxpayers and jurors will have been burdened with a trial admittedly based on thousands of varying, fact-laden retail transactions.

10. A writ of mandate should issue to provide appellate guidance as to the meaning of Proposition 64 and to correct the Respondent Court's plain legal error on both the UCL and breach of warranty claims.

11. This Court has authority to issue the requested writ of mandate pursuant to California Constitution Art. 6, §10 and C.C.P. §§1084-86. *See* CAL. CIVIL WRIT PRACTICE (Cont.Ed.Bar-CA 1987) §4.11, at 112-14, 8 WITKIN CAL. PROC. WRITS §§3, 6 (4th ed. 1997).

12. This Petition pertains to a Statement of Decision the Court entered on November 22, 2005, which the Court served by fax the next day and with respect to which, on November 30, 2005, plaintiff served a Notice of Ruling and Order. (EXP 001-03). Accordingly, this Petition is timely.

See Volkswagen, 94 Cal.App.4th at 701 ("as a general rule, a writ petition should be filed within the 60-day period that is applicable to appeals").

PRAYER

WHEREFORE, for all of the above reasons and for the reasons stated in the accompanying Memorandum of Points and Authorities, petitioner Pfizer prays that this Court:

1. Issue a peremptory writ of mandate directing the Respondent Court to vacate its order certifying a class action and to enter a new and different order denying class certification;

2. In the alternative, issue an alternative writ of mandate directing the Respondent Court to vacate its order certifying a class action and to enter a new and different order denying class certification, or to show cause to this Court at a time and place specified why a peremptory writ of mandate should not issue;

3. If an alternative writ is issued, on return of the alternative writ and hearing on the order to show cause, issue a writ of mandate directing the Respondent Court to vacate its order certifying a class action and to enter a new and different order denying class certification;

4. Award petitioner its costs herein; and

5. Grant such other and further relief as may be deemed just and proper.

Dated: December 28, 2005

Respectfully submitted,

KAYE SCHOLER LLP

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VERIFICATION

I, Jeffrey S. Gordon, declare:

I am an attorney at law duly admitted to practice before all the courts of the State of California and am a partner in the law firm of Kaye Scholer LLP, attorneys of record herein for petitioner Pfizer Inc. The facts set forth in the petition for writ of mandate are within my personal knowledge. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than an officer of the petitioner, am verifying this petition.

I have read the petition for writ of mandate and I declare under penalty of perjury under the laws of the State of California that the matters set forth therein are true and correct.

Executed this 28 day of December, 2005 at Los Angeles, California.

Jeffrey S. Gordon

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

This is a petition for writ of mandate or other appropriate relief requiring the Respondent Court to vacate its November 22, 2005, Order certifying a class of "All persons who purchased Listerine, in California, from June 28, 2004 through January 7, 2005" with respect to plaintiff's claims under Sections 17200 and 17500 of the Business & Professions Code and plaintiff's express warranty claim.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. The Products and Advertising at Issue

Listerine is an essential oil-containing antimicrobial mouthrinse that, as demonstrated in clinical studies and found by the American Dental Association ("ADA"), "kills germs that cause bad breath, plaque and the gum disease gingivitis," and is effective in reducing plaque and gingivitis and in killing plaque bacteria between the teeth. (EXP 208, 214, 728, 855, 866). It is sold in numerous flavors and sizes, for a total of 34 different products. (EXP 855). Only 24% of U.S. households use floss, and 87% of consumers floss infrequently or not at all. (EXP 226, 822-23, 828).

Pfizer conducted two randomized, controlled, observer-blind, 6-month clinical trials of Listerine and floss according to ADA Guidelines, which were published in leading peer-reviewed journals. Both showed that twice-daily rinsing with Listerine is "at least as good as daily flossing in

controlling interproximal gingivitis when both are used unsupervised over a 6-month period," and that it is "significantly more effective than flossing" in reducing interproximal plaque over a 6-month period. (EXP 208-19, 229-39, 241).

After the ADA reviewed the studies and approved Pfizer's "as effective" claim, beginning in June 2002 Pfizer advertised the claim to dental professionals. (EXP 398-99, 488). In obtaining the ADA's approval of its consumer advertising, Pfizer provided results from a consumer reaction study to seven test "animatic" commercials showing that more than 90% of consumers indicated they would floss the *same* amount or *more* often after viewing one of the commercials. (EXP 400-07, 465-71, 478, 510-48, 551).

Four versions of the commercial were aired between June 14, 2004 and January 8, 2005. (EXP 855-56, 867-71). All four commercials aired on network, cable and syndicated television, although the commercials did not run on every medium continuously and no version aired on network television during eight different weeks. (EXP 855-56). The first version directed consumers to "ask your dentist" and "floss daily" and the remaining versions stated either "ask your dentist" or "ask your dental professional" and that "there's no replacement for floss" or "not a replacement for floss." (EXP 867-71). None of the commercials ran simultaneously, or continuously on the networks, in syndication or on cable (EXP 855-56), so

it cannot be predicted without individual inquiry which version, if any, a particular consumer saw.

In June 2004, Pfizer began to affix bottle labels stating: Listerine is "Clinically Proven" to be "As Effective As Floss Against Plaque and Gingivitis Between Teeth." The labels were revised twice over the next six months, adding the statements "ask your dentist," "floss daily," and "not a replacement for floss." (EXP 856). Out of 34 different Listerine products, 19 *never* included *any* label that made any floss comparison, and even for the flavors and sizes having such labels, not every bottle was shipped with an "as effective" label. (EXP 856-58). As for the other 15 bottles, some of which carried an "as effective" label, they had two to three different versions during the period June 2004 – January 2005. (EXP 860). However, the unique Uniform Product Code ("UPC") product identifier for each of these 15 bottles did *not* change, so the *same* UPC number can identify a bottle having no "as effective" label, as well as bottles having the first, second or third label variation. (*Id.*). Accordingly, it is not possible to determine from a bottle's UPC number which "as effective" label, if any, was on the bottle between June 2004 and early January 2005. (*Id.*).

With rare exception, the retail prices for *each* size and flavor of Listerine mouthrinse varied widely from week to week and from market to market during the relevant time period. (EXP 863-65). Pfizer also ran

numerous price promotions, which could have caused consumers to buy Listerine. (EXP 863).

Finally, the "as effective" claim had no apparent effect on dentists' recommendations or floss sales. Dentists' flossing recommendations were *stable* and consumers' floss consumption and use *increased* during the professional campaign. (EXP 511, 513-14, 526-31). When the initial and second Listerine commercials were broadcast, sales of floss *increased*, and sales *increased* in October 2004 to higher than the October 2003 level. (EXP 248-49, 251-52, 495, 498-99, 503-05).

B. Plaintiff's Testimony

Mr. Galfano did not buy mouthrinse before he purchased a bottle of Listerine in October or November 2004, and he did not use mouthrinse except on a few occasions to freshen his breath. (EXP 745-47, 753-56). He does not recall the name of the mouthrinse(s) he used. (EXP 747). Before he made his Listerine purchase, he used floss about "once a month," although he believes one has to floss "a couple of times a week" to get floss' benefits. (EXP 747-48, 752).

Plaintiff testified that he made his one Listerine purchase at his local Von's, but he did not recall how much he paid or what size bottle he bought and he has no receipt. (EXP 755-56, 759, 794-95). He bought Listerine due to the bottle's red label, which he recalled said "as effective as floss,"

but did not recall what else the label said, and testified unequivocally that he did *not* make his purchase based on any television or other ad. (EXP 759-61). He stated that he never saw the blue label, which is the second label with an "as effective" claim that was on some Listerine bottles. (EXP 761, 767-68). He used about one-half of the bottle he bought and threw it out in January 2005 when he saw an Internet reference to the *McNeil* ruling. (EXP 756-58, 784). He did not ask Pfizer or Von's for a refund and did not discuss with his dentist Listerine and floss' comparative efficacy. (EXP 776-77).

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

Mr. Galfano admitted that he could only testify as to his own experiences, and that it was only by speaking to each class member *individually* that the relevant facts about that class member's claim could be determined. Thus, he said he could *not* testify as to whether each class member flossed and, if so, which ones; whether members saw the label(s) – admitting that some people who buy a product regularly do not read the label; whether

members who read the statement "floss daily" on the blue label knew that they were supposed to continue flossing when using Listerine; whether members discussed with their dentists whether Listerine was a replacement for floss; whether members purchased Listerine "because of" the label; or whether members asked for a refund. (EXP 762-64, 777, 779-80, 782-83). He further testified that it was "probable" that class members might have had different reasons for choosing to buy Listerine other than the label, and that he did not know how much individual members paid for their Listerine. (EXP 801, 805). Indeed, his attorney repeatedly objected to questions as to these and other facts regarding class members – including what message, if any, they took away from the challenged label – on the ground that it would be "speculation" for Mr. Galfano to do so and that the questions called for the class members' "mental processes." (EXP 750-52, 765-67, 769-70, 779-80, 801-02). Of course, as explained below, that is precisely why the claims plaintiff asserts cannot be established by common proof.

ARGUMENT

A trial court's class certification must be reversed if the court abused its discretion; *i.e.*, if "'(1) improper criteria were used; or (2) erroneous legal assumptions were made.'" *Linder*, 23 Cal.4th at 435. "Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal 'even though there may be substantial evidence to support

the court's order," and, "[a]ccordingly, we must examine the trial court's reasons for denying class certification." *Id.* at 436 (quoting *Caro*, 18 Cal.App.4th at 655). *Accord, Washington*, 24 Cal.4th at 914. Even if the court applied the proper criteria and did not make erroneous legal assumptions, the reviewing court "must consider whether the record contains substantial evidence to support the trial court's predominance finding, as a certification ruling not supported by substantial evidence cannot stand." *Lockheed*, 29 Cal.4th at 1106.

Moreover, a "court by definition abuses its discretion when it makes an error of law." *Koon v. U.S.*, 518 U.S. 81, 100 (1996). "'It is elementary that the construction of a statute and the question of whether it is applicable present solely questions of law" and, thus, are "'subject to *de novo* review on appeal.'" *Essayli v. Dep't of Motor Vehicles*, 131 Cal.App.4th 1251, 1255 (2005); *Valladares v. Stone*, 218 Cal.App.3d 363, 367 (1990).

Applying these standards, time and again the Supreme Court and the Court of Appeals have reversed class certification orders. *See, e.g., Lockheed*, 29 Cal.4th at 1108 (affirming grant of writ of mandate reversing certification); *Washington*, 24 Cal.4th. at 913 (granting writ of mandate reversing certification); *Global*, 113 Cal.App.4th at 849-50; *Dean Witter*, 211 Cal.App.3d at 764. As demonstrated below, the same result should obtain here. Indeed, the Respondent Court acknowledged in its opinion that

the Proposition 64 requirements of "injury in fact" and "lost money or property as a result of" Pfizer's alleged conduct "*may preclude recovery on a class basis.*" (EXP 015) (emphasis added).

I.

PLAINTIFF MUST ESTABLISH EACH CLASS CERTIFICATION REQUIREMENT

To satisfy the requirements for class certification, "a plaintiff must establish . . . the existence of an ascertainable class and a well-defined community of interest among the class members." *Block v. Major League Baseball*, 65 Cal.App.4th 538, 542 (1998); *Lockheed*, 29 Cal.4th at 1104. "The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal.4th 319, 326 (2004); *Lockheed,* 29 Cal.4th at 1104. The Supreme Court further has held that a class action may be certified "only where substantial benefits accrue both to litigants and the courts." *Linder*, 23 Cal.4th at 435; *San Jose*, 12 Cal.3d at 459. "[W]hen potential recovery to the individual is small and when substantial time and expense would be consumed in distribution, the purported class member is unlikely to receive any appreciable benefit. The damage action being unmanageable and without substantial benefit to class members, it must then be dismissed." *Blue Chip*

Stamps, 18 Cal.3d at 386. In short, a class action "must be the superior means of resolving the litigation, for both the parties and the court." *Newell v. State Farm Gen. Ins. Co.*, 118 Cal.App.4th 1094, 1101 (2004).

Equally clear is that the "burden is on the party seeking certification to establish" each requirement for certification "as a matter of fact," and not just that there is a "reasonable possibility" they may be. *Washington*, 24 Cal.4th at 913; *Hamwi v. Citinational-Buckeye Inv. Co.*, 72 Cal.App.3d 462, 471-72 (1977). Trial courts, thus, should carefully "scrutiniz[e] a proposed class cause of action," because "issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses." *Linder*, 23 Cal.4th at 443; *see Caro*, 18 Cal.App.4th at 656. Accordingly, the court must consider evidence submitted not only by plaintiff but also by defendant. *Quacchia*, 122 Cal.App.4th at 1448; *Norwest Mortg., Inc. v. Super. Ct.*, 72 Cal.App.4th 214, 221 (1999).

Finally, in determining whether a plaintiff has met his burden of establishing that the claims alleged in the complaint can be proven on a class-wide basis, the substantive law governing those claims is not altered "to make class actions more available." *San Jose*, 12 Cal.3d at 462. As the

Supreme Court explained:

> Class actions are provided only as a means to enforce substantive law. *Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going.* (*Id.*) (emphasis added).

II.

THE RESPONDENT COURT COMMITTED PLAIN LEGAL ERROR IN INTERPRETING PROPOSITION 64

To establish the UCL claims, plaintiff must prove, *inter alia,* with respect to his §17200 claim, that Pfizer committed an "unlawful, unfair or fraudulent business act or practice" or "unfair, deceptive, untrue or misleading advertising" and, with respect to his §17500 claim, that Pfizer made an "untrue or misleading" advertisement. BUS. & PROF. CODE §§17200, 17500.

Under Proposition 64, plaintiff must also prove for each UCL claim both injury and proximate cause; *i.e.*, that he "has suffered injury in fact and has lost money or property *as a result of* such" practice. §17204 (emphasis added). The Respondent Court, however, ruled that these requirements apply only to the named plaintiff and not to class members. This ruling is plain error for two principal reasons. It is contrary to Proposition 64's express language and to the clear rule that the same law governs both the class members' claims and the named plaintiff's claims.

A. Proposition 64 Requires a Showing of Injury in Fact, Loss of Money and Proximate Causation

It is well established that where "statutory language is clear and unambiguous, its plain meaning must prevail." *Cal. Ins.*, 128 Cal.App.4th at 316. *Accord, e.g., 14859 Moorpark Homeowner's Ass'n v. VRT Corp.*, 63 Cal.App.4th 1396, 1407 (1998); *Valladares*, 218 Cal.App.3d at 368. "The quest for legislative intent is not unbounded: '[I]t still remains true, as it always has, that there can be no intent in a statute not expressed in its words, and there can be no intent upon the part of the framers of such a statute which does not find expression in their words.'" *City of Sacramento v. Public Employees' Retirement Sys.*, 22 Cal.App.4th 786, 793 (1994). These "'same principles that govern the construction of a statute'" apply to statutes enacted by citizen propositions. *Foreman,* 126 Cal.App.4th at 342; *People v. Hinkel,* 125 Cal.App.4th 845, 851 (2005).

Proposition 64's amendment of §17204 could not be clearer. In order to maintain an action for "*any* relief" under Sections 17200 or 17500, the plaintiff must "ha[ve] [1] *suffered injury in fact and* [2] ha[ve] *lost money* or property [3] *as a result of* such unfair competition." (Emphasis added). No "person" can assert a 17200 or 17500 claim unless he proves *each* of these elements in addition to establishing that the defendant committed "unfair competition." *See Cal. Teachers Ass'n v, Governing Bd.*, 14 Cal.4th 627, 634 (1997) ("'In analyzing statutory language, we seek

to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose.'").

The phrase "as a result of" is a clear requirement that plaintiff prove the challenged advertisement was the proximate cause of his "injury in fact" and "los[s of] money or property." In interpreting the identical language of §1780(a) the Civil Remedies Act – that only a consumer "who suffers any damage *as a result of* the use . . . of a [prohibited] method, act or practice" "may bring an action" (emphasis added) – the Court of Appeal held that "[r]elief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof." *Wilens*, 120 Cal.App.4th at 753-54. Similarly, courts in other states having consumer fraud statutes with identical "as a result of" language have held – regardless of whether the suit was an individual or class action – that the statute requires that the plaintiff establish that he saw the offending ad, that the ad deceived him, and that the deception proximately caused him injury in fact. (*See* p. 7 n.2, *supra*).

Ignoring all of this, the Respondent Court relied instead on *Massachusetts Mutual Life Ins. Co. v. Superior Ct.*, 97 Cal.App.4th 1282 (2002). (EXP 010). That decision, however, interpreted the UCL *before* Proposition 64 and was based on an alleged "nondisclosure." *Id.* at 1286. The decision, thus, provides no support for the ruling here – where Proposition

64 *does* apply and where plaintiff alleges Pfizer made *affirmative* misrepresentations.

B. Proposition 64's Requirements Apply to Class Actions as Well as Individual Actions

Proposition 64's amendment of §17203 provides that the three "requirements" of injury, loss of money and proximate causation apply to class actions "*and*" that the class certification requirements must be met:

> 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. (emphasis added).

Only the Attorney General and other specified government officials do not have to satisfy these requirements. *Id.* This express language, together with the express language of §17204 itself, is directly contrary to the Respondent Court's view that these requirements do not apply to class members' claims. Not only does Proposition 64 expressly apply both to class claims *and* to individual claims, but it does *not* include class members in its exclusion of government officials from these requirements. *See Lake v. Reed*, 16 Cal.4th 448, 466 (1997) (applying *expressio unius* "maxim").

Significantly, there is not even a hint in other cases interpreting Proposition 64 that it applies differently to individual and class actions. To the contrary, courts have interpreted it as providing that "a citizen may bring a lawsuit *only* if he or she 'has suffered injury in fact *and* has lost money or

property as a result of such unfair competition.'" *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of Am.*, 129 Cal.App.4th 540, 569-70 (2005) (emphasis added) (representative action).[7]

Proposition 64's text confirms that the Respondent Court erred in holding it inapplicable to class members. Thus, among the "misuse[s]" the people of California did "find and declare" in enacting Proposition 64 were that lawsuits had been filed where the plaintiff had not "viewed the defendant's advertising" or had not been "injured in fact." Prop. 64 §1(b)(2)-(3). It defies logic that, in enacting Proposition 64, California *barred* individual and representative parties from suing where they had not seen the defendant's advertising (and thus, by definition, could not have been deceived or injured by it), but *permitted* recovery for the very same persons if they were class members.

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[7] *See Aureflam Corp. v. Pho Hoa Phat I, Inc.*, 375 F. Supp.2d 950, 955 (N.D. Cal. 2005) (17200 claim "*requir[es]* a showing of an *actual injury* that *resulted from* [defendant's] allegedly unfair business practices") (emphasis added) (individual action); *Envtl. Prot. Info. Ctr. v. U.S. Fish & Wildlife Serv.*, 2005 U.S. Dist. LEXIS 7200, *11-12 (N.D. Cal. April 22, 2005) (same); *Uyeda v. J.A. Cambece Law Office, P.C.*, 2005 U.S. Dist. LEXIS 9271, *12-13 (N.D. Cal. May 16, 2005) ("a private plaintiff would have standing *only* if [he] 'has suffered injury in fact and has lost money or property as a result [of such unfair competition]'") (emphasis added) (class action); *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal.App.4th 1228, 1261 (2005) (Proposition 64 "require[s] that a private party may bring a representative action *only* if he or she meets the standing requirement of section 17204 . . . .") (emphasis added).

"'Each class member must have standing to bring the suit in his own right.'" *Collins*, 187 Cal.App.3d at 73. That is because a class action "is merely a procedural device for consolidating" "individual" or "separate" "actions" of "many individuals" that otherwise would have to be "individually litigate[d]." *Vernon v. Drexel Burnham & Co.*, 52 Cal.App.3d 706, 716 (1975); *Washington*, 24 Cal.4th at 913; *Sav-On Drug*, 34 Cal.4th at 335, 339 n.10; *Linder*, 23 Cal.4th at 435; *Blue Chip Stamps*, 18 Cal.3d at 386; *Weaver*, 32 Cal.2d at 838.

Moreover, the California Supreme Court has ruled that "[c]lass actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going." *San Jose*, 12 Cal.3d at 462.[8] Yet that is exactly what the Respondent Court did here in holding that Proposition 64's "substantive law" must be changed "to accommodate" the class action procedure. *See Feitelberg v. Credit Suisse First Boston LLC*, 2005 Cal.App. LEXIS 1900, *24-25, 39 (Dec. 9, 2005) ("Class certification does not serve to enlarge substantive rights or remedies. . . . The tail does not wag the dog.").

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[8] *Accord*, *Washington*, 24 Cal.4th at 918 (granting writ of mandate reversing certification); *Basurco v. 21st Century Ins. Co.*, 108 Cal.App.4th 110, 120 (2003) (affirming class certification denial); *Collins*, 187 Cal.App.3d at 72 (same).

In short, the Respondent Court's ruling turns Proposition 64 and this law on its head. It is nonsensical and contrary to Proposition 64's express language to say that Mr. Galfano can assert "claims" on behalf of a class member who, if he asserted his claims individually, would have no claim because, in the words of Proposition 64, he cannot establish that he "suffered injury in fact," "lost money or property," and suffered "injury and loss of money" "as a result" of being deceived by the challenged ads or labels.

III.

THE RESPONDENT COURT ABUSED ITS DISCRETION IN FINDING THAT COMMON ISSUES PREDOMINATE OVER INDIVIDUAL ISSUES

A "critical" element of C.C.P. §382 plaintiff must establish with "substantial evidence [is] . . . that common issues *predominate*" over issues "requiring separate adjudication." *Lockheed*, 29 Cal.4th at 1108 (Court's emphasis); *Kennedy v. Baxter HealthCare Corp.*, 43 Cal.App.4th 799, 810 & n.6 (1996). "[I]f a class action 'will splinter into individual trials,' common questions do not predominate and litigation of the action in the class format is inappropriate." *Id.*

As a general rule, "the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining [the member's] individual right to recover following the 'class judgment' determining issues common

to the purported class." *San Jose*, 12 Cal.3d at 459. *Accord*, *Washington*, 24 Cal.4th at 913. Plaintiff must establish that he can prove the claims of *each* class member by "common proof," and that to succeed at trial class members will *not* have to submit individual proof of the claims for individual adjudication. *Baltimore Football Club*, 171 Cal.App.3d at 362-64; *Brown v. Regents*, 151 Cal.App.3d 982, 989 (1984) (same); *Sav-On Drug*, 34 Cal.4th at 334, 340 (affirming certification where any individual issues "may effectively be managed" and "each individual plaintiff would present . . . the same arguments and evidence").

Even before Proposition 64, the Court of Appeal in *Caro* affirmed an order denying class certification on facts similar to those here. Plaintiff alleged defendant violated Sections 17200 and 17500 and breached an express warranty by falsely advertising that its orange juice was "fresh" and "additive free." The Court affirmed denial of class certification on the ground that individual questions predominated because the named plaintiff "did not believe defendants' product to be 'fresh'" and "[w]hether other class members believed the juice was 'fresh' . . . [and] whether the claim of 'no additives' constituted a material representation" to them "would be a matter of individualized proof." *Caro*, 18 Cal.App.4th at 668. That is the exactly the case here where it cannot be assumed that each class member was actually deceived because, without asking each, it is not possible to

determine whether each read the label and, if so, took away a message that Listerine could be used instead of floss to fight plaque and gingivitis (assuming he purchased a bottle with an "as effective" label *and* read the label).

The Respondent Court attempted to distinguish *Caro* on the ground that Mr. Galfano testified in his deposition "that he *was* misled" by the label. (EXP 012) (emphasis by the Court). It is not enough, however, that the class representative was misled. The elements of the claim must be established for *both* the class representative and *each* class member because, as *Caro* (and Proposition 64) make clear, to succeed *each* class member must have been deceived and the deception have caused him injury. Indeed, in *Caro* the Court held that the individual issues of deception and materiality predominated precisely because they required "*individualized* proof" of "class *members*." *Caro*, 18 Cal.App.4th at 668 (emphasis added). Moreover, here, there are numerous individual issues as to whether each class member is entitled to restitution or damages.

In short, just as in *Whalen*, where the Court denied class certification of a Listerine consumer class action, "each of the claims would require individualized proof concerning the various bases for liability and damages." (EXP 1448).

A. The Respondent Court Abused Its Discretion in Certifying a Class on Plaintiff's UCL Claims

Only an individual inquiry of *each* class member can determine if, like Mr. Galfano, the member claims to have seen a challenged label or, unlike Mr. Galfano, the member claims to have seen a challenged commercial and, if so, which of the three labels and/or four commercials he saw. That is because the only way to determine whether any label or commercial misled a particular class member would be to inquire of *him* what message, if any, *he* took away from *that* label or commercial.

If (1) a consumer purchased bottles with the first label – which stated "Now Clinically Proven As Effective As Floss Against Plaque and Gingivitis Between The Teeth"– and (2) read the label, he (3) may have taken away the literal message that Listerine was as effective as floss against plaque and gingivitis, but not that it was a replacement for floss, because he may not have believed the claim or because he believed floss did things Listerine did not. Indeed, in the plaintiff's consumer survey in *McNeil*, only 39% of those questioned about the label stated that they "can use Listerine instead of floss," and when the survey's "control cell" is factored in, the percentage who took away a replacement message was only 17%. (EXP 703, 712). Similarly, because the second label (which began to be affixed to bottles in June 2004) explicitly stated "Ask Your Dentist. Floss Daily," and the third label (which began to be affixed on December 8, 2004) explicitly stated

"not a replacement for floss," it is reasonable to assume that even fewer consumers took away a replacement message from these labels. The only way to determine whether a particular class member who saw the first label is one of the 61% (*i.e.*, 83% when the control is factored in) who did *not* take away a replacement message from the first label, or whether a particular class member who saw the second or third label took away a replacement message, is to make an individual inquiry of *that* person.

Inquiries would have to be made of each class member who (unlike plaintiff) saw one of the four challenged commercials, with respect to the message he took away from the commercial. Thus, the class member may have taken away the commercial's literal message that he should "floss daily" or that Listerine was "not a replacement" for floss. When directly asked in the *McNeil* survey, a whopping 70% (92% with control) of consumers did *not* take away a replacement message from the third commercial. (EXP 688, 712). The only way to determine whether a particular class member took away a replacement message, is to make an individual inquiry of *that* person.

Moreover, some consumers, like Mr. Galfano, may "know I still need to floss" (EXP 774), so even if they got a replacement message, that message would not have misled them. Similarly, if a member visited his dentist during the time the advertising was running and (unlike plaintiff)

discussed Listerine and floss' efficacy, the dentist may have told him to continue to floss and, therefore, that member was not misled.

Individual inquiries also would be required to determine proximate causation. For example, the following class members would not have a UCL (or breach of warranty) claim:

- those who purchased Listerine to use exclusively as a breath freshener;
- those who are among the many brand loyal customers who bought Listerine before, during and after the challenged advertising ran and without regard to the advertising;
- those who, as confirmed by Pfizer's market research (EXP 860-62), bought on the basis of recommendations of friends, relatives, dentists or pharmacists and without reference to advertising or the claims on the labels;
- those who did not pay attention to the "as effective" label or commercial or read the label or commercial literally and saw, as some of the labels and commercials stated, that users were to "Floss Daily" and that Listerine was "Not a Replacement for Floss" and did not change their flossing behavior, and/or saw, as some of the labels or commercials stated, "Ask Your Dentist," and consulted their dentist who advised them to

keep flossing; and

- those who bought Listerine solely because they saw a price promotion (*see* ESP 863).

Even assuming that an individual inquiry showed that the member read an ad and was misled by it and that the alleged deception caused him to purchase Listerine, *each* member must also prove that the advertising claim was false *as to him*. If he never uses floss or flosses improperly or (as plaintiff) infrequently so that he does not get flossing's benefit, then Listerine *is* as effective as floss *as to him*. Nor could he be injured *as a result of* using Listerine because (as Judge Chin acknowledged in *McNeil*, 351 F. Supp.2d at 257), Listerine *is* effective against plaque and gingivitis. Moreover, for those who switched from another mouthrinse, not only is there is no proof that any mouthrinse is as effective as Listerine, but it may have cost the same (or less) so that the class member suffered no economic harm. In addition, the only way to determine *which* mouthrinse a particular member would have purchased and at what price(s), would be to ask him and the retailer, because otherwise he could not prove he "suffered injury in fact and has lost money or property as a result of" the allegedly deceptive label. BUS. & PROF. CODE §17204. In short, as the Court explained in *Whalen* – consistent with the numerous cases from across the country denying certification of consumer fraud class actions on the ground that

individual issues predominated[9] – "an individual inquiry would be necessary to determine whether each plaintiff was actually harmed due to the [alleged] deceptive acts of the defendant." (EXP 1449).

Accordingly, a trial as to Mr. Galfano would not suffice to establish Pfizer's liability to *all* class members. As he repeatedly conceded in his deposition, each of these issues would require an individual inquiry of each class member. (EXP 762-64, 777, 779-80, 782-83). As he also admitted, he could only testify as to his own experiences, and not as to what other members may have seen, done or perceived. (*Id.*). Indeed, his attorney asserted it would be "speculation" for Mr. Galfano to do so. (EXP 750-52,

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9 *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 567 (E.D. Ark. 2005); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 66-69 (S.D.N.Y. 2002); *Guillory v. Am. Tobacco Co.*, 2001 U.S. Dist. LEXIS 3353, *24-25 (N.D. Ill. 2001); *Williams v. Ford Motor Co.*, 192 F.R.D. 580, 585 (N.D. Ill. 2000); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 492, 503 (S.D. Ill. 1999); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 532 (N.D. Ill. 1998); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 372 (N.D. Ill. 1998); *Stephenson v. Bell Atlantic Corp.*, 177 F.R.D. 279, 294 (D.N.J. 1997); *Harding v. Tambrands, Inc.*, 165 F.R.D. 623, 630 (D. Kan. 1996); *Strain v. Nutri/Sys., Inc.*, 1990 WL 209325,*6 (E.D. Pa. Dec. 12, 1990); *Key v. Jewel Cos.*, 530 N.E.2d 1061, 1065 (Ill. App. Ct. 1988); *Charles Hester Enterps. v. Illinois Founders Ins. Co.*, 484 N.E.2d 349, 361 (Ill. App. Ct. 1985); *Cartiglia v. Johnson & Johnson Co.*, 2002 WL 1009473, *15-16 (N.J. Super. Law Div. Apr. 24, 2002); *Gross v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 696 A.2d 793, 797-99 (N.J. Super. Law Div. 1997).

765-67, 769-70, 779-80, 801-02). We agree.[10]

Finally, "remedies are limited" under §§17200 and 17500. *Korea Supply Co. v. Lockheed Martin Corp.* 29 Cal.4th 1134, 1144 (2003). "[D]amages cannot be recovered," and "'plaintiffs are generally limited to injunctive relief and restitution.'" *Id.*; *Feitelberg*, 2005 Cal.App. LEXIS 1900, at *40 ("nonrestitutionary disgorgement is not available [in] . . . a class action"). Thus, if plaintiff seeks a refund, he must return the benefit he received, or, where, as here, he cannot do so, he is entitled only to the difference between what he paid and the fair market value of what he received. *See, e.g., California Fed. Bank v. Matreyek*, 8 Cal.App.4th 125, 134 (1992); RESTATEMENT (FIRST) OF RESTITUTION, §1 cmts. a, c (1937); RESTATEMENT (SECOND) OF RESTITUTION, §19, §19 cmt. c, §22 (Tentative Draft No. 1, 1983). In other words, even if Listerine is not a replacement for floss, because it indisputably freshens the user's breath and fights plaque and gingivitis, an individual inquiry is required to determine the

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[10] This case is thus distinguishable from *Vasquez v. Superior Ct.*, 4 Cal.3d 800, 808-09 (1971), in which defendants' salesmen made the *identical* false representations in a memorized, face-to-face sales pitch to *each* class member. Here, in contrast, where there are three labels and four commercials at issue and the only evidence as to any alleged deception with respect to any of the advertising is that the vast majority of consumers who read the first label and saw the third commercial did *not* take away a replacement message, there is no basis to *presume* that *every* class member saw and was deceived by the labels and that such deception proximately caused *each* of them injury.

difference, if any, between the value of the benefit the class member received and the price he paid.

Given that none of these issues can be resolved on a class-wide basis, it is not surprising that the Respondent Court attempted to postpone them indefinitely because, in the Court's words, they " may preclude recovery on a class basis." (EXP 0015). In doing so, the Court committed clear error.

B. The Respondent Court Abused Its Discretion in Certifying a Class on Plaintiff's Express Warranty Claim

To establish breach of an express warranty, plaintiff must prove: (1) Pfizer made an "affirmation of fact or promise . . . to the buyer which relates to the goods and becomes part of the basis of the bargain," (2) Pfizer breached the warranty, and (3) "the breach was the proximate cause of the loss sustained." COMM. CODE §2313(1)(a); COMM. CODE §2314, OFFICIAL COMMENT 13. Moreover, assuming that privity is not required to maintain a breach of express warranty claim (in which event plaintiff's claim would have to be dismissed because he is not in privity with Pfizer (EXP 859), plaintiff must establish that he "relied on representations made by" Pfizer. *See, e.g., Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 695-96 (1954); *Fieldstone Co. v. Briggs Plumbing Prods., Inc.*, 54 Cal.App.4th 357, 369 n.10 (1997); *Smith v. Gates Rubber Co.*, 237 Cal.App.2d 766, 768 (1965). As for the "measure of damages, it "is 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, unless special circumstances show proximate damages of a different amount." COMM. CODE §2714. Finally, plaintiff "must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy." *Id.* §2607.

Given the individual nature of each of these inquiries, time and again courts have denied motions to certify express warranty claims on the ground that reliance is a predominating individual issue.[11]

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[11] *See, e.g., Castano*, 84 F.3d at 745; *In re Ford Motor Co. Bronco II Prod. Liab. Litig*, 177 F.R.D. 360, 369 (E.D. La. Feb. 27, 1997); *Rosenstein v. CPC, Int'l, Inc.*, 1991 WL 1783, *3 (E.D. Pa. Jan. 8, 1991); *Freedman v. Arista Records, Inc.*, 137 F.R.D. 225, 229 (E.D. Pa. 1991) (denying class certification because "the question of reliance is highly individualized"). *See also Gross,* 696 A.2d at 793 (denying class certification where there were individualized questions as to whether each class member "relied on at least one of the three particular advertisements . . . when deciding to purchase" the product); *Strain*, 1990 WL 209325, at *6 ("the reliance issue requires each class member to narrate a story which includes individualized proof of which advertisements he saw and whether they indeed enrolled in reliance on those advertisements"); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 361 (S.D. Ga. 1996) ("because reliance must be addressed . . . and because each class member's subjective understanding . . . will have to be analyzed, this Court finds that the individual issues predominate over the common issues"); *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 240 n.3 (S.D. Ind. 1995) ("the necessity of proving reliance by each class member upon the alleged fraudulent misrepresentation causes individual issues to predominate"); *Truckway, Inc. v. General Elec.*, 1992 WL 70575, **5, 7 (E.D. Pa. 1992) (individual issues predominated in state consumer fraud action (continued...)

The Respondent Court ignored this case law and did not question that it could not be determined on a class-wide basis whether the alleged warranty was a "basis of the bargain" for a particular class member – that the member saw and *relied* on the warranty – whether Pfizer breached the warranty as to that class member, and whether, if so, the breach proximately caused that class member injury. Indeed, the Court severed the express warranty claim because it had "reservations" as to whether class members could establish damages, concluding that "[i]t is unclear what damages, *if any*, the class could conceivably recover as a result of the alleged warranty breach." (EXP 010 n.3, 015) (emphasis added).

Relying on *Anthony v. Gen. Motors Corp.*, 33 Cal.App.3d 699 (1973), the Court stated that it "was not entitled to conclude, without a trial, that no express warranty to the class as a whole could be proved." (EXP 009). The issue for class certification, however, is not whether *no* express warranty to the class could be proved, but whether, as to *each* class member, a breach of an express warranty that proximately caused *each* class member injury could be established without an individual inquiry.

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11 (...continued)
"[b]ecause not all members of the class would have relied on the alleged fraudulent material omissions and misrepresentation . . . and because a determination of whether each member of the class was defrauded . . . would require each class member to individually prove the issue of reliance and fraud on a case by case basis").

As the Court explained in *Osborne* in denying certification of an express warranty claim where, unlike in *Anthony*, the plaintiff sought damages, "an inference [of reliance] arises only if the representation forms a part of the transaction," and "plaintiffs here failed to show that representations were made to each class member." 198 Cal.App.3d at 661. The Court concluded: "There was no basis to draw an inference of classwide reliance without a showing that representations were made uniformly to all members of the class." *Id.* The Court also specifically distinguished *Anthony*, noting that there:

> the court was careful to explain that certification was proper in view of the limited relief sought, *i.e.*, recall and repair. That injunctive remedy does not depend on wheel failure, but instead on the mere existence of a defect, one that may not have caused actual harm. No plaintiff in *Anthony* sought to recover money damages for economic losses caused by the defective wheels, *a remedy that requires a determination of causation.* (*Id.* at 660) (emphasis added).

Accord, Am. Suzuki, 37 Cal.App.4th at 1298 (distinguishing *Anthony*).

Indeed, the very quotation from the Official Comment to Commercial Code §2313 on which the Respondent Court relied states that the issue of reliance "normally is one of fact." (EXP 009). After quoting this, the Respondent Court stated that "determination" of whether there was:

> specific *reliance* by the class . . . must be *preserved for subsequent proceedings* and is subject to further development of the facts. (EXP 010) (emphasis added).

By postponing the issue of whether reliance could be determined on

a class-wide basis, the Court failed to comply with the requirement that it must determine *at the time it certifies a class* whether common issues predominate over individual ones and whether they can be tried consistent with the defendant's due process right to notice of the individual class members' claims, to cross-examine each member on each element of his claims, impeach that testimony by challenging the adequacy of his recollections, and offer evidence in opposition. *Washington*, 24 Cal.4th at 927; *Lockheed*, 29 Cal.4th at 1106.[12] As the Texas Supreme Court held in rejecting such a "certify now and worry later" approach, "[i]f it is not determinable *from the outset* that the individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate." *Bernal*, 22 S.W.3d at 435-36 (emphasis added). *See Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 426 (5th Cir. 2004) (rejecting "figure-it-out-as-we-go-along"approach).[13] In reversing class certification, the Court

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12 *See, e.g., In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998); *Hegglin v. Workmen's Compensation Appeals Bd.*, 4 Cal.3d 162, 175 (1971); *Beverly Hills Multispecialty Group , Inc. v. Workers' Comp Appeals Bd.*, 26 Cal.App.4th 789, 804-05 (1994); CAL. CONST. ART. 1, §7.

13 Consistent with the rule that the "the party seeking certification has the burden to establish" each class certification requirement, *Sav-On Drug*, 34 Cal.4th at 326, many courts require a "suitable and realistic plan for trial" specifying *how* the claims and defenses can be tried manageably and in a way that protects the defendant's due process rights. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (continued...)

further explained that "basic to the right to a fair trial – indeed, basic to the very essence of the adversarial process – is that each party have the opportunity to adequately and vigorously present any material claims and defenses." *Bernal,* 22 S.W.3d at 437-38. *See Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (irrebuttable presumption violates due process because it denies defendant an "opportunity to present evidence showing" the contrary).

The reason the Respondent Court failed to address *how* reliance could be determined here on a class-wide basis is because it cannot. Only by individually inquiring of each class member can it be determined whether they relied on the warranty in making their Listerine purchasing decision.

Moreover, as is clear from plaintiff's testimony that he was unsure of the size and price of the bottle he bought and that he has no purchase receipt, it is only by speaking to *each* class member that it can be determined which Listerine flavor and size a particular member purchased, whether the bottle had an "as effective" label and, if so, which bottle and

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[13] (...continued)
(9th Cir. 2001). *See also, e.g., Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *Bernal*, 22 S.W.3d at 435. Not surprisingly, given that no plan could be designed to try the myriad, predominating, individual issues here, plaintiff failed to submit, and the Respondent Court failed to adopt, a trial plan or otherwise explain *how* the individual issues could be tried in a manageable and constitutionally permissible way.

label, where he purchased it, what price he paid, and whether he has receipts. Each of these issues requires individualized inquiries dependent on the "vagaries of memory," *In re PPA Prods. Liab. Litig.*, 214 F.R.D. 614, 617 (W.D. Wash. 2003) (denying certification) – thus overwhelming any common issues and rendering a class action unmanageable, particularly given Listerine's widely varying retail prices. (EXP 863-65).[14]

For example, a class member who bought Listerine as a breath freshener as well as based on the "as effective" claim still received the benefit of breath freshening. Moreover, even the minority of people who (according to Judge Chin's findings based on survey evidence) purchased Listerine based on an "as effective" claim, received the benefit of a product effective in fighting plaque and gingivitis. These benefits have to be quantified and

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[14] *Compare Bennett v. Regents,* 133 Cal.App.4th 347, 358 (2005) (affirming class certification denial where damages "require a case-by-case trial"); *Block*, 65 Cal.App.4th at 543-44 (affirming certification denial where the value of each plaintiff's right at issue varied and plaintiffs "failed to provide the court with any method to account for this variation when awarding damages"), *with Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 714 (1967) (certifying class where "each individual class member is known to defendant and the exact amount of the overcharge can be ascertained from defendant's books and records"). *See also, e.g., Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 306-07 (5th Cir. 2003) ("plaintiffs' proposed damages formula . . . attempts to project a measure of damages, for all the class members, that in no way accounts for the vast differences among those class members"); *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 449 (6th Cir. 2002); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977) (*en banc*).

compared to the benefit of a rinse that could be used to replace floss. This determination is highly individualized. Even if a class member were able to establish the price he paid, his damages would not be that amount, but, rather, that amount *less* the value of the benefit *he* received from *his* use of the product. As one court explained in denying certification of a consumer fraud claim challenging a drug's efficacy, "whether an individual class member got his or her money's worth is inherently individual." *In re Rezulin*, 210 F.R.D. at 69.

Finally, Pfizer's defenses also raise individual issues.[15] *See Grogan-Beall v. Ferdinand Roten Galleries, Inc.*, 133 Cal.App.3d 969, 976 (1982) (individual issues must be considered "[r]egardless of who bears the burden of proof" on a given issue; affirming certification denial).

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[15] For example, to the extent some consumers were misled by a label or commercial but continued to buy Listerine after learning of the alleged misstatement, individual issues exist with respect to, *inter alia*, defenses of waiver, estoppel, and failure to mitigate damages. *See, e.g., Block*, 65 Cal.App.4th at 544 (although some issues were common for proposed class members, "others – such as the affirmative defenses of consent, waiver, or estoppel – clearly were not," and "[t]he fact that the trial court would be obligated to evaluate each of these defenses for each member of the class weighed heavily against certification"); *Kennedy*, 43 Cal.App.4th at 811 ("[d]efenses will require individual litigation of claims"); *Keith v. Buchanan*, 173 Cal.App.3d 13, 24 (1985) (where buyer is aware of defect before purchase, "he may be deemed to have waived the seller's express warranties"); *South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.App.4th 861, 869-70 (1999) (plaintiff had no claims under 17200 or 17500 where it expected defendant to use the challenged practice).

IV.

THE RESPONDENT COURT ABUSED ITS DISCRETION IN FINDING THAT PLAINTIFF'S CLAIMS ARE TYPICAL AND THAT PLAINTIFF IS AN ADEQUATE CLASS REPRESENTATIVE

Two other elements of the "community of interest requirement" necessary for certification are that the plaintiff have claims "typical of the class" and that he can "adequately represent and protect the interests of other members of the class." *Block*, 65 Cal.App.4th at 542; *San Jose*, 12 Cal.3d at 463. These elements are intertwined: "'to be an adequate representative, plaintiff must show that her claims are typical of the claims of the class.'" *Caro*, 18 Cal.App.4th at 669. "'It is the fact that the class plaintiff's claims are typical and his representation of the class adequate which gives legitimacy to permitting him to bind class members.'" *Id.* at 664. Indeed, as a matter of due process, absent class members cannot be bound by a class action judgment unless the plaintiff's claims were representative of the claims the class members could have asserted and the named plaintiff adequately represents the class members' interests. *Hansberry v. Lee*, 311 U.S. 32, 41-43 (1940). In short, as the California Supreme Court held in reversing certification, the class representative is required "to protect the interests of the absent class members, even imposing a fiduciary duty to do so on the representative class member." *San Jose*, 12 Cal.3d at 464.

To establish typicality, plaintiff must show that he is "situated similarly to class members." *Caro*, 18 Cal.App.4th at 663. "'There can be no cognizable class unless it is first determined that members who make up the class have sustained the same or similar damage.'" *Id.* at 664. *Accord*, *Collins*, 187 Cal.App.3d at 72 (class members must have sustained "common harm or damage"). As noted above, in *Caro*, a 17200 action, the Court of Appeal affirmed denial of certification because, *inter alia*, the plaintiff "failed to demonstrate [that] his claims were typical of class members' claims," so that he was not "truly representative of the class and thus did not establish as a matter of fact the requisite community of interest for class certification." 18 Cal.App.4th at 662-63. In fact, plaintiff did not actually think the orange juice was fresh, had not read the entire label, and "would have had questions about the juice if he had read the whole label." *Id.* at 663. Thus, his claim did not relate to any ill-gotten gains by the manufacturer; nor could he be said to have given up anything in the transaction because he expressly did not believe he was buying fresh orange juice. *Id.* at 664.

The same is true here. Plaintiff's testimony demonstrates that his claims are not typical of those alleged on the class' behalf. Indeed, he repeatedly admitted that his experience was not necessarily the same as that of other class members and that he could not testify as to what other mem-

bers may have seen, done or perceived, his attorney asserted it would be "speculation" for plaintiff to do so, and he testified unequivocally that he did *not* make his purchase based on any television or other ad or "anything" else. (*See* pp. 24-25, *supra*).

For the same reason, he is an inadequate representative. His interests conflict with those of class members who, unlike he, saw one of the challenged commercials or the second or third label. He will have an incentive at any trial to focus on the particular label he saw so that he can succeed on his individual claim. He will have no incentive to establish claims based on the other two labels or the four commercials because, win or lose, that will not help *him* recover on *his* claim. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997) (settlement reversed where plaintiff's interests were "not aligned" with some class members' interests).

V.

THE RESPONDENT COURT ABUSED ITS DISCRETION IN FINDING THAT CLASS TREATMENT WILL PROVIDE SUBSTANTIAL BENEFITS

Our Supreme Court "has consistently admonished trial courts to carefully weigh respective benefits and burdens and to allow maintenance of the class action *only* where substantial benefits accrue both to litigants and the courts." *San Jose*, 12 Cal.3d at 459 (emphasis added). *Accord*, *Dean Witter*, 211 Cal.App.3d at 773 (denying certification); *Osborne*, 198

Cal.App.3d at 653 (same); *Frieman v. San Rafael Rock Quarry, Inc.*, 116 Cal.App.4th 29, 34 (2004) (same); *Newell*, 118 Cal.App.4th at 1101 (sustaining demurrer to class allegations).

Here, because "the ability of each member of the class to recover clearly depends on a separate set of facts applicable only to him, then all of the policy considerations which justify class actions equally compel" denial of certification. *Newell*, 118 Cal.App.4th at 1101. There is no justification for certifying a class where, even if plaintiff prevailed, no relief could be provided because he could not prove the "*measurable amounts*" to be restored to class members because of the absence of records of the prices class members paid and the varying value they received from their Listerine use. *Day v. AT&T Corp.*, 63 Cal.App.4th 325, 339 (1998) (Court's emphasis). *See City of Philadelphia v. Am. Oil Co.*, 53 F.R.D. 45, 73 (D.N.J. 1971) ("this Court is not satisfied that the motorist who purchased from a retail service station . . . has available to him the type of records necessary to make any meaningful distribution of damage awards if liability and general damages are established"). The same is true here where, like plaintiff, most people do not keep receipts for mouthrinses, let alone keep bottles showing what the label said. Nor is there any pent up need for a class action. This is the *only* lawsuit involving Listerine in California, only 17 consumers contacted Pfizer regarding the "as effective" claim, and only

a few asked for (and then, of course, received) refunds. (EXP 896-97; 865). Nor is there any need for an injunctive class since the challenged advertising is already permanently enjoined. (*See* p. 13 n.6, *supra*).

A "principal purpose" of class actions is to achieve "efficiency and economy of litigation." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). A class action here would accomplish neither goal. Just as in *Whalen*:

> the court would need to conduct extensive inquiry into the lives of individual members of the class in order to a[ss]ess injury and damages, it would be inefficacious and difficult to manage the litigation, and is not an appropriate use of judicial economy. The use of the class action is not, as such, superior to other available methods. (EXP 1454).

VI.

THE RESPONDENT COURT ALSO ABUSED ITS DISCRETION IN FINDING AN ASCERTAINABLE CLASS

A class is ascertainable only if it is administratively feasible to determine if a given individual is a class member. *Daar*, 67 Cal.2d at 706. In *Daar*, the class members could be determined from "detailed records of the identity of the purchasers and users of each . . . script book." 67 Cal.2d at 701 & n.5. *See also Global Minerals*, 113 Cal.App.4th at 858 (in determining ascertainability, court must consider "the means available for identifying class members"). It is crucial that a class be ascertainable because "[o]therwise, it is not possible . . . to determine after the litigation has con-

cluded who is barred from relitigating" as a matter of *res judicata*. *Id.* Here, neither of the Respondent Court's two reasons for concluding the class it certified is ascertainable has any merit.

First, the Court reasoned that "[n]otice by publication" could be given. (EXP 007). But notice does not, in the Court's words, provide a "means of identifying potential class members." (*Id.*). Notice can be both over and under inclusive because people who did not purchase Listerine may read the notice, and people who did purchase Listerine may not read the notice.

Second, the Court stated that five retailers "can identify consumers who purchased Listerine and used their 'club card' to make the purchase.'" (EXP 007). But not all purchasers at these stores use such cards to make their purchases, and the identifying records of those who do are not always complete or up to date. (EXP 892-95, 898-901). In addition, plaintiff submitted declarations for only five stores, and therefore they are irrelevant to whether other retailers have records from which class members and their purchases can be identified. For example, Wal-Mart does not have such records and, thus, "has no way to track the Wal-Mart stores' customers' purchases." (EXP 895).

More fundamentally, the Court failed to address *how* consumers could prove that they are class members. Pfizer does not sell to consumers

and it has no records to identify purchases by consumer. (EXP 859). There is no reason to believe that consumers who bought Listerine in retail stores between June 28, 2004 and January 7, 2005 are going to have purchase records, any more than plaintiff did, or any more than consumers would have records showing they bought a particular brand of mustard or ketchup on a particular day with a particular label. Nor is it likely that many, if any, consumers will have kept the Listerine bottle they purchased.

In short, regardless of whether consumers are club members, the only way to determine if they are class members would be to make an individual inquiry of each one. At best, the most that will result will be testimony as to consumers' best recollection as to a purchase they made over a year ago. This, in turn, will present a triable issue for *each* consumer as to the testimony's reliability.

CONCLUSION

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

Dated: December 28, 2005

Respectfully submitted,

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CERTIFICATION

I, Jeffrey S. Gordon, an attorney at law duly admitted to practice before all the courts of the State of California and am a member of the law firm of Kaye Scholer LLP, attorneys of record herein for petitioner and defendant Pfizer Inc., hereby certify that this document (including the Petition and Memorandum of Points and Authorities together, including headings, footnotes and quotations, but excluding the tables of contents and authorities, the verification and this certification) complies with the limitations of Rule of Court 14(c)(1) in that it is set in a proportionally spaced 13-point typeface and contains 13,896 words as calculated using the word count function of WordPerfect.

By: _____
Jeffrey S. Gordon

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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

On December 29, 2005, I served the foregoing document described as:

PETITION FOR WRIT OF MANDATE;
EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDATE (VOLUMES I THROUGH VI)

on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

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

Executed on December 29, 2005, at Los Angeles, California.

Lisa Mammone
Name

Signature

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