Case No.: _____

IN THE
SUPREME COURT OF CALIFORNIA

PFIZER INC.,

Petitioner,

v.

SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

STEVE GALFANO,

Real Party in Interest.

AND RELATED ACTIONS.

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

PETITION FOR REVIEW

R. Duane Westrup (Bar No. 58610)
Christine C. Choi (Bar No. 205656)
WESTRUP KLICK LLP
444 W. Ocean Blvd., Suite 1614
Long Beach, California 90802-4524
Telephone: (562) 432-2551
Facsimile: (562) 435-4856
E-Mail: cchoi@wkalaw.com

Allan A. Sigel (Bar No. 24908)
Law Offices of Allan A. Sigel
1125 Gayley Avenue
Los Angeles, California 90024-3403
Telephone: (310) 824-4070
Facsimile: (310) 208-7271
E-Mail: aas@sigellaw.com

Attorneys for Plaintiff, Real Party in Interest, and Petitioner

Service on District Attorney of Los Angeles County
and Attorney General, Consumer Law Section,
required by Business and Professions Code Section 17209

TABLE OF CONTENTS

TABLE OF CONTENTS
[CONTINUED]

TABLE OF AUTHORITIES

Page:

California Cases:

TABLE OF AUTHORITIES
[CONTINUED]

Page:

TABLE OF AUTHORITIES
[CONTINUED]

Page:

Other Cases:

TABLE OF AUTHORITIES
[CONTINUED]

Page:

TABLE OF AUTHORITIES
[CONTINUED]

Page:

California Statutes:

California Rules:

Other Statutes:

TABLE OF AUTHORITIES
CONTINUED

Page:

Other Authorities:

ISSUES PRESENTED

1. Whether, contrary to this Court's recent ruling in Californians for Disability Rights v. Mervyn's, LLC, Proposition 64 eviscerated the fraud prong of California's consumer protection statutes by adding a requirement that the representative plaintiff prove that ***each*** putative class member ***relied*** on a defendant's false or misleading representation in a class action brought under Sections 17200 and/or 17500 of the Business and Professions Code (collectively, the "UCL").

2. Whether Proposition 64 abolished the well-settled and long-standing "likely to deceive" standard under the UCL.

3. Whether Proposition 64 diminished California's consumer protections by requiring the representative plaintiff to establish that ***each*** putative class member suffered an injury in fact and lost money or property as a result of a defendant's UCL violation.

WHY REVIEW SHOULD BE GRANTED

This case presents questions of great importance to all consumers throughout California. If the ruling issued by the Court of Appeal for the Second Appellate District ("Second District") in this case stands, it will effectively legislate the biggest rollback of consumer protections in California history and move California from the forefront of leadership in consumer protection to the dark ages of *caveat emptor*.

The Second District's decision is utterly inconsistent with this Court's recent decision in Californians for Disability Rights v. Mervyn's, LLC (2006) — Cal.Rptr.3d —, 2006 WL 2042601, wherein this Court

unanimously held that:

> [Proposition 64] measure left entirely ***unchanged the substantive rules*** governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and ***nothing earlier forbidden is now permitted***.

[Mervyn's, — Cal.Rptr.3d —, 2006 WL 2042601, *4 (citation and footnote omitted; emphasis added).] Because the Second District's decision in this case was issued before and without the benefit of this Court's reasoned analysis in Mervyn's, it held that Proposition 64 did, in fact, change the substantive rules governing UCL liability.

Prior to Proposition 64's enactment, this Court and the Appellate Courts uniformly held that a business practice is "fraudulent" under the UCL if "members of the public are likely to be deceived."[1] In other words, the courts recognized that ***actual reliance and actual deception are not elements of a plaintiff's UCL claims***. Children's Television, 35 Cal.3d at 211, 197 Cal.Rptr. 783, 673 P.2d 660; Schnall, 78 Cal.App.4th at 1167, 93 Cal.Rptr.2d 439. All that is required is proof that "members of the public are likely to be deceived." Children's Television, 35 Cal.3d at 211, 197 Cal.Rptr. 783, 673 P.2d 660; Chern v. Bank of America (1976) 15 Cal.3d 866, 875-76, 127 Cal.Rptr. 110, 544 P.2d 1310.

---

[1] *See, e.g.,* Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1267, 10 Cal.Rptr.2d 538, 833 P.2d 545; Committee on Children's Television v. General Foods Corp. (1983) 35 Cal.3d 197, 211, 197 Cal.Rptr 783, 673 P.2d 660; Schnall v. The Hertz Corp. (2000) 78 Cal.App.4th 1144, 1167, 93 Cal.Rptr.2d 439; Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 682, 38 Cal.Rptr.3d 36; Progressive West Ins. Co. v. Superior Court (2005) 135 Cal.App.4th 263, 284, 37 Cal.Rptr.3d 434.

In construing Proposition 64, however, the Second District made the following holdings:

1. Proposition 64 added a requirement that the representative plaintiff prove that each putative class member relied on a defendant's false or misleading representation in a UCL class action. [Pfizer, Inc. v. Superior Court (2006) 45 Cal.Rptr.3d 830, 844, 851-853; 141 Cal.App.4th 290.]

2. Proposition 64 abolished the well-settled and long-standing "likely to deceive" standard under the UCL. [Id. at 844, 850-851.]

3. Proposition 64 requires the representative plaintiff to establish that each putative class member suffered an injury in fact and lost money or property as a result of a defendant's UCL violation. [Id. at 844, 849.]

Review is required because the foregoing precedent established by Pfizer is inherently and unambiguously contrary to this Court's opinion in Mervyn's.

From a policy perspective, the Second District's decision must also be overruled because it eviscerates the UCL's fundamental public purpose of providing a class action remedy for consumers who are mulcted by deceptive business practices. By abolishing the "likely to deceive" standard and adding an individual reliance requirement that makes the UCL unsuitable for class treatment, the Second District's consumers will now be forced to bring a multitude of individual claims (rather than a single class action) before the courts. The absence of the threat of class-wide liability under the UCL eliminates a major deterrent to consumer abuse "[i]n a day of mass media advertising

hype intended to saturate the markets with inducements to purchase the heralded product". *See* Amato v. General Motors Corp. (1982) 11 Ohio App.3d 124, 126-127; 463 N.E.2d 625, 628-629.

The Second District's ruling completely disregards the compelling rationale adopted by the United States Supreme Court, the Ninth Circuit, and other consumer-oriented states in the nation which have consumer protection laws analogous to the UCL. While this issue is one of first impression in the California courts, each of those jurisdictions hold that reliance may be presumed in false advertising and misrepresentation cases.

For these reasons and other reasons set forth herein, Plaintiff respectfully requests that this Court grant review of the Second District's decision to secure uniformity with its decision in Mervyn's and settle important questions of law. CRC, rule 28(b)(1).

BACKGROUND

Defendant Pfizer Inc. ("Defendant") is the manufacturer of Listerine mouthwash ("Listerine"). Defendant launched a national "Flossing Claim" advertising campaign, wherein Defendant represented to consumers that Listerine is "As Effective As Floss". [Exhibits in Support of Petition for Writ of Mandate ("EXP") 000121.]

As part of its "Flossing Claim" campaign, Defendant affixed shoulder labels on its Listerine bottles with the representation "As Effective As Floss". In addition, Defendant ran television commercials on countless national television and radio stations. [EXP 00121, 123-125, 134-135.]

Plaintiff Steve Galfano ("Plaintiff") purchased a bottle of Listerine. 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. [EXP 00113-114.]

Subsequent to his purchase, 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 causes of action for false advertising, pursuant to Business and Professions Code section 17500 *et seq.* ("Section 17500"); and 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"). [EXP 00041-70.]

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 to purchase 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.

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 UCL claims. In finding that common questions of law and fact predominate, 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.]" *See* Massachusetts Mut. Life Ins. Co. v. Superior Court (2002) 97 Cal.App.4th 1282, 1288, 119 Cal.Rptr.2d 190. [EXP 0001-

17.]

Defendant filed a petition for writ of mandate, seeking a directive from the Second District to vacate the trial court's order certifying a class action. On July 11, 2006, the Second District granted Defendant's petition, directing the respondent court to vacate its order granting Plaintiff's motion for class certification.

LEGAL DISCUSSION

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 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 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].[2]

---

[2] 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 ...

Bus. & Prof. Code §17203.

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

> Actions for injunction under this section may be prosecuted ... 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].

Prior to Proposition 64's passage, Business and Professions Code Sections 17204 and 17535 permitted suit to be brought by "any person acting for the interests of itself, its members, or the general public." In short, a person completely unaffected by the defendant's business practice and/or advertising could sue and obtain all the remedies available under the UCL. Standing was granted to everyone without any claim that he or she suffered any injury. Proposition 64 eliminated this so-called "unaffected plaintiff" standing. Under current law, only persons who have been injured in fact and lost money as a result of the unfair competition or false advertising have standing to bring actions for relief under the UCL. William L. Stern, Bus. & Prof. C. §17200 Practice (2005), §§ 2:47:3-4.

I. PROPOSITION 64 DID NOT ABOLISH THE WELL-SETTLED AND LONG-STANDING "LIKELY TO DECEIVE" STANDARD UNDER THE UCL.

Business and Professions Code 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. Prior to Proposition 64's enactment, this Court and the Appellate Courts held that a business practice is "fraudulent" under the UCL if "members of the public are likely to be deceived." [*See* Footnote 1 herein.] The Second District recognized that "[h]istorically, in order to state a cause of action under either the UCL or the FAL, case law only required a showing that " 'members of the public [were] *likely to be deceived.*' [Citations.]" (Children's Television, Inc. v. General Foods Corp., supra, 35 Cal.3d at p. 211, 197 Cal.Rptr.783, 673 P.2d 660, italics added.) Allegations of actual deception, reasonable reliance and damage were unnecessary. (Ibid.)" Pfizer, 45 Cal.Rptr.3d at 850, 141 Cal.App.4th 290.

Nonetheless, contrary to the long-established law interpreting the UCL, the Second District erroneously held:

> ... unless an action under the UCL or the FAL is brought by the Attorney General or local public prosecutors, ***the mere likelihood of harm to members of the public is no longer sufficient*** for standing to sue. Persons who have not suffered any "injury in fact" and who have not lost money or property as a result of an alleged fraudulent business practice or false advertising (§§ 17204, 17535) ***cannot state a cause of action based merely on the "likelihood" that members of the public will be deceived.***

Pfizer, 45 Cal.Rptr.3d at 850, 141 Cal.App.4th 290 (emphasis added). In short, the Second District found that Proposition 64 abolished the UCL's "likely to be deceived" standard. Id. at 844, 850-851.

This holding, however, cannot be reconciled with this Court's recent decision in Californians for Disability Rights v. Mervyn's, LLC, — Cal.Rptr.3d —, 2006 WL 2042601, wherein the California Supreme

Court found that there was no substantive change to the UCL:

> To apply Proposition 64's standing provisions to the case before us is not to apply them "retroactively," as we have defined that term, because the measure does not change the legal consequences of past conduct by imposing new or different liabilities based on such conduct. (Citation.) The measure left entirely ***unchanged the substantive rules*** governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and ***nothing earlier forbidden is now permitted.***
>
> **********
>
> [T]he only rights and expectations Proposition 64 impairs hardly bear comparison with the important right the presumption of prospective operation is classically intended to protect, namely, ***the right to have liability-creating conduct evaluated under the liability rules in effect at the time the conduct occurred.*** (Citations.)

[Id. at *4-5 (citations and footnote omitted; emphasis added).]

Because it is undisputed that (1) prior to Proposition 64's enactment, a business practice was forbidden if "members of the public are likely to be deceived" [*See* Footnote 1 herein] and (2) Proposition 64 left entirely unchanged the substantive rules governing business and competitive conduct [Id. at * 4], it necessarily follows that, pursuant to this Court's ruling in Mervyn's, conduct that is "likely to deceive" cannot be permitted after Proposition 64. To hold otherwise leads to inconsistent results.

II. PROPOSITION 64 DID NOT DIMINISH CALIFORNIA'S CONSUMER PROTECTION STATUTES BY REQUIRING THE REPRESENTATIVE PLAINTIFF TO ESTABLISH THAT *EACH* PUTATIVE CLASS MEMBER SUFFERED AN INJURY IN FACT AND LOST MONEY OR PROPERTY AS A RESULT OF A DEFENDANT'S UCL VIOLATION.

The Second District erroneously held that all class members being represented by the named plaintiff must have suffered an injury in fact and lost money or property as a result of UCL violation. Pfizer, 45 Cal.Rptr.3d at 844, 849, 141 Cal.App.4th 290. This holding, like the others, must similarly be overruled.

A. The Second District's Determination That Proposition 64 Added the Elements of "Reliance" and "Injury" for Each Putative Class Member Is Based upon Inherently Flawed Logic.

The rationale underlying the Second District's abrogation of the well-established law that "reliance" and proof of "injury in fact" are not elements for a UCL action is inherently flawed. The Second District made the following deduction: since Proposition 64 imposed a requirement that the representative plaintiff satisfy the requirements applicable to class actions, a class representative cannot satisfy the "typicality" requirement if he or she must prove "reliance" and "injury in fact", while the rest of the class does not. Pfizer, 45 Cal.Rptr.3d at 844, 849, 141 Cal.App.4th 290

This logic is inherently flawed because our courts have long held that "typicality" does not require absolute identity in facts and interests. All that is required is that the class representative is *similarly situated* to the class. [B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal.App.3d 1341, 1347, 235 Cal.Rptr. 228] "[I]t has never been the law in California that the class representative have *identical* interests with

class members. The only requirement is that common questions of fact and law *predominate* and that the class representative be *similarly* situated." Id.

The Second District's rigid view of commonality is directly contrary to this Court's opinion in Richmond v. Dart (1981) 29 Cal.3d 462, 174 Cal.Rptr. 515, 629 P.2d 23, where it ruled:

> Further, '[most] differences in situation or interest among class members . . . should not bar class suit. If the factual circumstances underlying class members' claims differ, or if class members disagree as to the proper theory of liability, the trial judge, through use of techniques like subclasssing or 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. Even if differences among class members are more fundamental, having to do with the type of relief which should be sought or indeed with whether the class opponent ought to be held liable at all, judicial accommodation appears to provide a sufficient mechanism for the protection of absentee interests . . .

Id. at 473 [citation omitted].

Even when the class representative has sustained different or distinct damages (or no damages at all), a trial court may still find the class representative is appropriate if he or she can adequately represent the class. [*E.g.*, La Sala v. American Sav. & Loan Assn. (1971) 5 Cal.3d 864, 872, 97 Cal.Rptr. 849, 489 P.2d 1113.] The typicality issue relates to whether the class representative has the ability to represent the class' interests – not vice versa. Thus, when the Second District rationalized that since Proposition 64 imposed a class certification requirement in UCL actions, any additional requirement imposed upon the class representative ***must*** necessarily be imposed upon the class, it made a leap in logic that was without any foundation.

Indeed, the class representative ***who meets standing requirements*** must prove each of the elements that the rest of the class has to prove – the fact that the class representative might have additional standing requirements is ***completely irrelevant*** to the "typicality" requirement.

There is nothing in the Proposition 64's history or any case law interpreting Proposition 64 that supports the Second District's rationale. The Second District's "typicality" analysis runs directly counter to this Court's determination in Mervyn's that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct". Californians for Disability Rights v. Mervyn's, LLC, — Cal.Rptr.3d —, 2006 WL 2042601, *4. Accordingly, the Second District's determination that Proposition 64 imposed new elements of "reliance" and proof of "injury in fact" upon putative class members in UCL action is simply incorrect.

B. 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.

The Proposition 64's stated intent was to require named plaintiffs to demonstrate an injury in fact under the standing requirements of Article III of the United States Constitution, which in turn, requires that federal courts exercise jurisdiction only over justiciable "cases" or "controversies". Anunziato, 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 [internal quotations and citations 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 United States Constitution's standing requirements 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". 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)]. In other words, Plaintiff meets the Article III standing requirements imposed by Proposition 64 and may pursue a false advertising class action under the UCL without having to prove each putative class member's reliance on a particular representation.

C. All Class Members Suffered the Same Injury in Fact.

The Second District also failed to recognize that, even if Proposition 64 requires that each class member in a UCL action suffer an injury in fact as a result of Defendant's false advertising, such does not impede class certification.

In Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 38 Cal.Rptr. 3d 36, 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. Besides holding that Leatherman's "Made in U.S.A." representations were deceptive as a matter of law, the Appellate Court also observed that restitution to the class 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." Id. at 699 [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 (i.e., Leatherman's "Made in U.S.A." representation). Id. at 700.

Similar to Colgan, Plaintiff here alleges that Defendant labeled and advertised that its products were "As Effective as Floss", when in fact, they are not. [EXP 00046-48, 50-51,121, 123-125, 134-135.] Pursuant to the rule set forth in Colgan, the injury in fact suffered by the class members in this case is "the amount of restitution necessary to restore purchasers to the *status quo ante*", limited to "the advantage realized" by Defendant as a result of its misleading "As Effective As Floss" representation. Id. at 697-700. Therefore, under Colgan, ***each class member in this case suffered the same injury*** as a result of the cumulative impact of the representations made in Defendant's advertising campaign.

D. The Case Law Relied upon by the Second District Is Distinguishable.

In support of its ruling, the Second District cites Collins v. Safeway Stores, Inc. (1986) 187 Cal.App.3d 62, 231 Cal.Rptr. 638, for the proposition that all class members, not just the named plaintiff, must have suffered an injury to have standing "to bring the suit in his own right".

Collins, however, is factually distinguishable from the instant case. Collins was a class action against egg farmers for the sale and distribution of contaminated eggs. In that case, it was determined that not all the eggs had been contaminated, and even the contaminated eggs did not necessarily cause illness when ingested. Id. at 69. Therefore, some of the proposed class members in Collins were completely unharmed.

In this case, Plaintiff alleged that Defendant's representation that Listerine is "As Effective As Floss" is false and that the misrepresentation was made on the label of each of the Listerine

bottles purchased by all class members. Thus, the impact of the injury and the amount of restitution due to each class member is the same – the amount "necessary to restore purchasers to the *status quo ante*", limited to "the advantage realized" by Defendant as a result of its misleading "As Effective As Floss" representation. *See* Colgan, 135 Cal.App.4th at 697-700, 38 Cal.Rptr. 3d 36. As such, unlike Collins, the merits of the individual class members' claims can be resolved on a class basis.

Additionally, this Court in Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 97 Cal.Rptr.2d 179, 2 P.3d 27, distinguished Collins and reversed the lower courts' denial of class certification, in as much as the lower court ruled that the merits of the individual class members' claims based upon their respective injuries could not be established on a class wide basis. Id. at 442. Therefore, in a time when advertising campaigns seek to persuade by saturating the markets with thousands of advertising messages per day, the Second District's requirement that the named plaintiff prove each class member's reliance on a particular representation stands in direct conflict with Proposition 64's express authorization of false advertising class actions.

III. IF THE SECOND DISTRICT'S RULING STANDS, IT WOULD NULLIFY EXPRESS LANGUAGE CONTAINED IN PROPOSITION 64 AND IGNORE THE VOTERS' DECLARED PURPOSE IN ENACTING THE MEASURE.

In its opinion, the Second District improperly concluded that:

> [Proposition 64], which was promoted as adding a standing requirement to the UCL and FAL, has had the effect of dramatically restricting these consumer protection measures. For example, as the district court recognized in Anunziato, the addition of a reliance requirement may

> preclude a consumer who did not read and rely on a label from stating a UCL or FAL claim in a 'short weight' or 'short count' case. (Anunziato v. eMachines, Inc., *supra*, 402 F.Supp.2d at p. 1137.) However, this court must take the statutory language as it finds it. Given the new restrictions on private enforcement under the UCL and the FAL, enforcement of these statutes in legitimate cases is increasingly the responsibility of a vigilant state Attorney General and/or local public prosecutors.

Pfizer, 45 Cal.Rptr.3d at 853, 141 Cal.App.4th 290 [Footnote omitted]. The Second District erred in this conclusion because (A) it nullifies the express language in Proposition 64 that allows representative claims to be brought, and (B) it ignored the voters' intent to preserve the ucl as a consumer protection tool.

A. Requiring Individualized Proof of Reliance and Deception Nullifies the Express Language in Proposition 64 That Allows Representative Claims to Be Brought.

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

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". Proposition 64 §1(b) and (e). Proposition 64 did not nullify a named plaintiff's ability to "pursue representative claims or relief on behalf of others" for a defendant's false 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.

This Court previously acknowledged the importance of such representative UCL suits:

> Both consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights. Class actions and representative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions ... These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.

Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116, 126, 96 Cal.Rptr.2d 485, 999 P.2d 718 [Footnote and citations omitted.]. "Due to the burdens imposed on public agencies, adequate government enforcement of laws is not always possible, making private action imperative." Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal.App.4th 499, 545, 63 Cal.Rptr.2d 118 [citation omitted].

If this Court adopts the Second District's interpretation of Proposition 64 (i.e., that the named plaintiff in a class action must prove individual reliance and deception for each putative class member), the UCL's language that specifically allows class actions to be brought

would be rendered "mere surplusage". *See* Colgan, 135 Cal.App.4th at 683, 38 Cal.Rptr.3d 36. Pursuant to Colgan, this Court must "instead seek to give significance to every word" [Id.], including the express provisions allowing class actions, and decline the Second District's attempt "insert what has been omitted or omit what has been inserted" [Id. at 684] "under the guise of construction" [Id.]. To do otherwise would nullify an affected plaintiff's ability to "pursue representative claims or relief on behalf of others" for false representations made by a defendant through mass media advertising campaigns. [*See* Bus. & Prof. Code §§ 17203, 17535.]

B. *The Second District's Ruling Ignored the Voters' Intent to Preserve the UCL as a Consumer Protection Tool.*

The Second District also ignored the long-standing rule that:

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

Horwich v. Superior Court (1999) 21 Cal.4th 272, 276, 87 Cal.Rptr.2d 222, 980 P.2d 927 [Citations and internal quotations omitted; emphasis added.]. *See also* People v. Canty (2004) 32 Cal.4th 1266, 1276-1277,

14 Cal.Rptr.3d 1, 90 P.3d 1168; In re Littlefield (1993) 5 Cal.4th 122, 130, 19 Cal.Rptr.2d 248, 851 P.2d 42; In re Lance W. (1985) 37 Cal.3d 873, 889, 210 Cal.Rptr. 631, 694 P.2d 744. ***"In the case of a voters' initiative statute, too, we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less."*** Hodges v. Superior Court (1999) 21 Cal.4th 109, 114, 86 Cal.Rptr.2d 884, 980 P.2d 433.

Here, Proposition 64's findings and declarations of purpose explain, "This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices." Proposition 64 §1(a). The findings further state, "It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to Chapter 5 (commencing with Section 17200) of Division 7 of the Business and Professions Code." Id. at §1(d).

Notably, Proposition 64's text did ***not*** inform the voters that the proposition would drastically change the UCL's substantive elements by abolishing the well-settled and long-standing likelihood of deception standard and adding a reliance element akin to that for common law fraud. If, however, this Court adopts the Second District's interpretation of Proposition 64 (i.e., that the named plaintiff in a class action must prove that each putative class member relied on Defendant's misrepresentation), it would be ignoring the voters' expressed intent to preserve the UCL as a consumer protection tool and would provide advertisers with virtual immunity from its unfair and fraudulent practices.

IV. PROPOSITION 64 DID NOT EVISCERATE THE FRAUD PRONG OF CALIFORNIA'S CONSUMER PROTECTION STATUTES BY ADDING AN INSURMOUNTABLE REQUIREMENT THAT THE REPRESENTATIVE PLAINTIFF PROVE THAT EACH PUTATIVE CLASS MEMBER RELIED ON THE DEFENDANT'S FALSE OR MISLEADING REPRESENTATION IN A UCL CLASS ACTION.

In holding that Proposition 64 added a reliance element to the UCL, the Second District attempted to rationalize its decision by stating the following:

> Inherent in Proposition 64's requirement that a plaintiff suffered "injury in fact ... *as a result of*" the fraudulent business practice or false advertising (§§ 17204, 17535, italics added) is that a plaintiff actually *relied* on the misrepresentation and as a result, was injured thereby. [Footnote omitted.] Here, for example, to have suffered an injury in fact as a result of the alleged misrepresentation, a plaintiff would have had to read Pfizer's label "as effective as floss against plaque and gingivitis" or some similar statement and relied thereon in buying Listerine.

Pfizer, 45 Cal.Rptr.3d at 851-852, 141 Cal.App.4th 290. However, this holding, as with the Second District's holding that Proposition 64 substantively changed the UCL's "likely to be deceived" standard, is clearly in error.

In Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 197 Cal.Rptr. 783 , 673 P.2d 660, this Court expressly affirmed that a consumer fraud plaintiff may bring a class action without individualized proof of reliance:

> A long-term advertising campaign may seek to persuade by cumulative impact, not by a particular representation on a particular date ... [A]dults buying a product in a store will not often remember the date and exact message of the advertisements which induced them to make that purchase. Plaintiffs should be able to base their cause of action on an allegation that they acted in response to an

> advertising campaign even if they cannot recall the specific advertisements.

Id. at 219. Accordingly, this Court reversed the trial court's judgment to permit the plaintiffs to correct any uncertainty or lack of required specificity in their fraud causes of action. Id. at 221.

The Appellate Courts followed this Court's analysis in other cases. For instance, in Boeken v. Philip Morris Inc. (2006) 127 Cal.App.4th 1640, 26 Cal.Rptr.3d 638, the Appellate Court found that direct proof of the specific advertisements inducing a plaintiff's purchase was unnecessary to support a finding of reliance in a consumer fraud action. Id. at 1659-1666. In reaching this conclusion, the Appellate Court relied, in part, on the testimony from the plaintiff's marketing, advertising, and consumer behavior expert:

> [The expert] testified that [the plaintiff's] inability to recall being influenced by any particular advertisement does not mean that it was not a cause of his [injury]. [The expert] described various media for advertising, and explained that the average person receives about 1000 advertising messages per day, too many for most people to process; so most are perceived in glimpses, making repetition an important feature in advertising. Thus, even if advertising images remain in the background, and are perceived only in glimpses, repetition causes them to become familiar, creating associations in the minds of people who do not think them through. This results in "associative learning", and those influenced by it are unlikely to be aware of it.

Id. at 1661.

Furthermore, in considering parallel language found in the same UCL section at issue here[3], this Court held that restitution is proper

---

[3] "The court may make such orders or judgments ...as may be necessary to prevent the use or employment by any person ... of any practices which violate this chapter, or which may be necessary to

without an individualized showing of reliance:

> [Section 17535] authorizes a trial court to order restitution in the absence of proof of lack of knowledge in order to deter future violations of the [UCL] and to foreclose retention by the violator of its ill-gotten gains.

Fletcher v. Security Pac. Nat. Bank (1979) 23 Cal.3d 442, 449, 153 Cal.Rptr. 28, 591 P.2d 51. Clearly, the integrity of the substantive law requires the same interpretation of Proposition 64's "as a result of" language.

Imposing a reliance requirement into the UCL would not only eviscerate any purpose that the UCL has independent of common law fraud [*see* Anunziato v. eMachines, Inc. (C.D. Cal. 2005) 402 F.Supp.2d 1133, 1138], it would also impose a higher standard than that for consumer fraud cases. Accordingly, this Court must decline to read a reliance requirement into the UCL.

V. UNDER THE "LITTLE FTC ACTS" OF EVERY MAJOR CONSUMER-ORIENTED STATE IN THE NATION, LIABILITY CAN BE PROVEN EVEN IF THE PLAINTIFF DOES NOT PROVE RELIANCE OR ACTUAL DECEPTION.

The Second District's holding that Proposition 64's "as a result of" language requires reliance and actual deception is inconsistent with the interpretation of the "Little FTC Acts" of every major consumer-oriented state in the nation. The Federal Trade Commission ("FTC") and other courts hold that, in spite of a statute's "as a result of" language, actual

---

restore to any person in interest any money or property, real or personal, which may have been acquired ***by means of*** any practice in this chapter declared to be unlawful." Bus. & Prof. Code § 17535 [emphasis added]; *see also* Bus. & Prof. Code § 17204.

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

A. FTC

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

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

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

> enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

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

The Ninth Circuit interpreted the FTC Act as follows:

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

FTC v. Figgie Int'l, Inc. (9th Cir. 1993) 994 F.2d 595, 605-606 [emphasis added]. *See also* FTC v. Cyberspace.com (9th Cir. 2006) — F.2d —, 2006 WL 1928496, *2 [A practice falls within the FTC Act's prohibition of deceptive practices (1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material.]; Trans World Accounts, Inc. v. FTC (9th Cir. 1979) 594 F.2d 212, 214 [Proof of actual deception is unnecessary to establish a violation of the FTC Act. Misrepresentations are condemned if they possess a tendency to deceive.].

The guidance offered by the federal courts above with regard to the FTC Act applies equally to actions brought under California's UCL. Like the federal FTC Act, California's UCL serves a public purpose by authorizing a person "who has suffered an injury in fact and lost money or property as a result of [a UCL violation]" to seek redress on behalf of other consumers.

In this case, a presumption of actual reliance arises once Plaintiff proves that (1) Defendant made material misrepresentations to the class members by claiming that "the use of Listerine can replace the use of dental floss in reducing, among other things, plaque and gingivitis"; (2) the misrepresentations were widely disseminated; and (3) consumers purchased Defendant's product. *See* Figgie at 605-606. Thus, proof of actual reliance and deception for each putative class member is unnecessary to establish a UCL violation. To require such would thwart effective prosecution of large consumer redress actions and frustrate the UCL's goals.

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

The courts of every major consumer-oriented state in the nation follow the FTC's lead and hold that actual reliance and deception are ***not*** required under their state's "Little FTC Acts". Below are just a few examples which recognize that the imposition of an individual reliance requirement for each putative class member would abrogate the possibility of bringing a class suit against all advertisers who, today, saturate the markets with thousands of representations heralding their products.

Illinois

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

brought under Illinois' Little FTC Act.

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

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

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

Michigan

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

The Michigan Supreme Court recognized:

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

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

Ohio

Ohio's Little FTC Act allows a consumer to recover damages or other appropriate relief in a class action when he or she is subjected to behavior which has been declared to be deceptive or unconscionable. Ohio Rev. Code §1345.09. The Ohio Appellate Court explained, "Ohio courts have consistently construed the applicable provisions of the [Little FTC Act] as only requiring proof that the conduct complained of has the likelihood of inducing in the mind of the consumer a belief

which is not in accord with the facts." Shaver v. Standard Oil Co. (1993) 89 Ohio App.3d 52, 63; 623 N.E.2d 602, 609.

The Ohio Appellate Court also addressed the specific issue of whether a cause of action under its Little FTC Act can be established without proof that individual plaintiffs had been exposed to a misleading representation or advertisement. Amato v. General Motors Corp. (1982) 11 Ohio App.3d 124, 126; 463 N.E.2d 625, 628. The court concluded:

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

Amato, 11 Ohio App.2d at 126-127; 463 N.E.2d at 628-629 [internal citations and footnotes omitted; emphasis added]. The Amato court further held that "proof of reliance may be sufficiently established by inference or presumption from circumstantial evidence to warrant submission to a jury without direct testimony from each member of the class." Amato, 11 Ohio App.2d at 128; 463 N.E.2d at 629.

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

Insofar as the language of a California statute is the same as that of another state, California courts generally give the same construction as the other states' courts. Erlich v. Municipal Court (1961) 55 Cal.2d 553, 558, 11 Cal.Rptr. 758, 360 P.2d 334. Thus, because the language of California's UCL has the same "as a result" language as the many states discussed above and specifically provides for the maintenance of class actions, Plaintiff respectfully requests that this Court overrule the Second District's decision in this case and instead, hold that actual reliance and deception are not required elements under the UCL. The Second District's requirement that a plaintiff prove reliance for each putative class member negates Proposition 64's express authorization of false advertising class actions.

---

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

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

CONCLUSION

California stands at a crossroads. If this Court allows the Second District's decision in this case to stand, the imposition of substantive and insurmountable requirements of proof of individual reliance and injury on the part of every putative class member class will gut the UCL. It will destroy the only economically viable tool for redressing widespread deceptive advertising claims. In short, it will herald a return to the doctrine of *caveat emptor*.

Because this result is incompatible with the goals of California's consumer protection statutes, because the Second District's construction of Proposition 64 is grievously flawed, and because the voters did not intend to eviscerate the fraud prong of California's consumer protection statutes by approving Proposition 64, the Court should grant Plaintiff's Petition for Review and act decisively to reject the Second District's construction of Proposition 64.

Dated: August 10, 2006

Respectfully submitted,

WESTRUP KLICK LLP

By: 
CHRISTINE C. CHOI

444 West Ocean Boulevard
Suite 1614
Long Beach, CA 90802-4524
(562) 432-2551

Attorneys for Plaintiff, Real Party in Interest, and Petitioner STEVE GALFANO

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 8,393 words as calculated using the word count function of WordPerfect.

By: _____
CHRISTINE C. CHOI

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PFIZER INC.,

Petitioner,

v.

SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

STEVE GALFANO,

Real Party in Interest.

B188106

(Los Angeles County
Super. Ct. No. BC327114)

COURT OF APPEAL - SECOND DIST.
FILED
JUL 11 2006
JOSEPH A. LANE Clerk
Deputy Clerk

ORIGINAL PROCEEDINGS in mandate. Carl J. West, Judge. Petition granted.

Kaye Scholer, Thomas A. Smart, Richard A. De Sevo and Jeffrey S. Gordon for Petitioner.

Hugh F. Young, Jr.; Shook, Hardy & Bacon, Paul B. La Scala, Victor E. Schwartz, Cary Silverman, for Product Liability Advisory Council, Inc. as Amicus Curiae on behalf of Petitioner.

Fred J. Hiestand; Morrison & Foerster, William L. Stern, for Civil Justice Association of California, California Chamber of Commerce, California Manufacturers and Technology Association and California Bankers Association, as Amici Curiae on behalf of Petitioner.

National Chamber Litigation Center Inc., Robin S. Conrad; Wiley Rein & Fielding, John E. Barry for the Chamber of Commerce of the United States of America, the Association of National Advertisers, Inc., and the Coalition for Healthcare Communications as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.

Westrup Klick, R. Duane Westrup, Christine C. Choi; Allan A. Sigel for Real Party in Interest.

Bill Lockyer, Attorney General, Tom Greene, Chief Assistant Attorney General, Albert Norman Shelden, Assistant Attorney General, Ronald A. Reiter and Kathrin Sears, Deputy Attorneys General, as Amicus Curiae.

Defendant Pfizer, Inc. (Pfizer), the manufacturer of Listerine mouthwash, seeks a writ of mandate to overturn respondent superior court's November 22, 2005 order certifying a class action filed by plaintiff and real party in interest Steve Galfano (Galfano). The complaint alleges Pfizer marketed Listerine in a misleading manner by indicating the use of Listerine can replace the use of dental floss in reducing plaque and gingivitis.

The trial court certified a class of "all persons who purchased Listerine, in California, from June 2004 through January 7, 2005." In view of the changes in the law brought about by Proposition 64, the class definition is plainly overbroad and must be set aside.

PRELIMINARY STATEMENT

The Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.)[1] was enacted to protect consumers as well as competitors from unlawful, unfair or fraudulent business acts or practices, by promoting fair competition in commercial markets for goods and services. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) The false advertising law (FAL) (§ 17500 et seq., added by Stats. 1941, ch. 63, p. 727, § 1) likewise prohibits consumer deception, and any violation of the FAL necessarily violates the UCL. (*Kasky, supra,* at pp. 949-950.)

Over the years, the UCL was an integral part of California law. As the Supreme Court observed in *Stop Youth Addiction, Inc., v. Lucky Stores, Inc., supra,* 17 Cal.4th at page 570, "whenever the Legislature has acted to amend the UCL, it has done so only to *expand* its scope, never to narrow it."

However, in recent years, the UCL became prone to the sort of abuse "which made the Trevor Law Group a household name in California in 2002 and 2003. The abuse [was] a kind of legal shakedown scheme: Attorneys form[ed] a front 'watchdog' or 'consumer' organization. They scour[ed] public records on the Internet for what [were] often ridiculously minor violations of some regulation or law by a small business, and sue[d] that business in the name of the front organization." (*People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317.)

---

1 The modern UCL first appeared in 1933, as an amendment to Civil Code former section 3369. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 568-569, fn. 8.) In 1977, the Legislature moved the UCL to section 17200 et seq. of the Business and Professions Code. (*Stop Youth Addiction, Inc.* at p. 570; Stats. 1977, ch. 299, p. 1202, § 1.)

All further statutory references are to the Business and Professions Code, unless otherwise indicated.

Proposition 64, an initiative measure approved at the November 2004 general election, was a response to abuse of the UCL and the FAL by certain lawyers, who were bringing "frivolous lawsuits against small businesses even though they had no client or evidence that anyone was damaged or misled." (Ballot Pamp., General Elec. (Nov. 2, 2004) Ballot Argument in Favor of Prop. 64, p. 40.) Proposition 64 imposed new restrictions on private enforcement under the UCL and the FAL.

The instant petition for writ of mandate requires this court to construe some of the key provisions of Proposition 64. In interpreting a voter initiative, " 'we apply the same principles that govern statutory construction. [Citation.] Thus, [1] "we turn first to the language of the statute, giving the words their ordinary meaning." [Citation.] [2] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] [3] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.] [¶] In other words, our 'task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent.' [Citation.]" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901.)

We address, inter alia, whether each member of the putative class asserting a claim under the UCL or the FAL must, in the language of Proposition 64, have suffered injury in fact and lost money or property as a result of such violation, or whether this standing requirement is only applicable to the class representative or named plaintiff.

Proposition 64 requires private representative actions to satisfy the procedural requirements applicable to class action lawsuits. (Ballot Pamp., General Elec. (Nov. 2, 2004) Prop. 64, Official Title & Summary, p 38.)[2] We conclude that in order to meet the "community of interest" requirement of Code of Civil Procedure section 382, which requires, inter alia, the class representative to have claims *typical* of the class, it is insufficient if the class representative alone suffered injury in fact and lost money or property as a result of the unfair competition or false advertising. (§§ 17204, 17535.) The class members being represented by the named plaintiff likewise must have suffered injury in fact and lost money or property as a result of such violation. (*Ibid.*)

We further conclude that unless an action under the UCL or the FAL is brought by the Attorney General or local public prosecutors, the mere likelihood of harm to members of the public is no longer sufficient for standing to sue. Persons who have not suffered any injury in fact and who have not lost money or property as a result of an alleged fraudulent business practice cannot state a cause of action merely based on the "likelihood" that members of the public will be deceived. (§§ 17204, 17535.)

Further, inherent in Proposition 64's requirement that a plaintiff suffered "injury in fact . . . *as a result of*" the fraudulent business practice or false advertising (§§ 17204, 17535, italics added) is that a plaintiff actually *relied* on the false or misleading misrepresentation or advertisement in entering into the transaction in issue.

---

2 "As with ballot pamphlet arguments, a reviewing court may look to a ballot's legislative analysis to determine voter intent. [Citation.] [¶] Finally, as a reviewing court is directed to look at the arguments contained in the official ballot pamphlet to ascertain voter intent, it is well settled that such an analysis necessarily includes the arguments advanced by both the proponents and opponents of the initiative. [Citation.]" (*Robert L. v. Superior Court, supra,* 30 Cal.4th at p. 906.)

We conclude the trial court's ruling, which certified a class consisting of all persons who purchased Listerine in California during a six-month period, is overbroad. We grant the relief requested.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The proposed class action complaint.*

On January 11, 2005, Galfano filed a consumer action against Pfizer in his individual capacity and on behalf of all others similarly situated, based upon Pfizer's alleged misrepresentations and failure to disclose material information in the marketing, labeling, advertising and sale of Listerine mouthwash.[3] Galfano pled that Pfizer advertised and promoted Listerine in a misleading manner by indicating the use of Listerine can replace the use of dental floss in reducing plaque and gingivitis. The complaint asserted causes of action for breach of express warranty, false advertising under section 17500 and unlawful, unfair and fraudulent business practices under section 17200.

With respect to the class action allegations, Galfano alleged he represented "[a]ll persons who purchased Listerine, in California, from approximately June of 2004 to the date of judgment in this action . . . ."

2. *Galfano's motion for class certification.*

On September 9, 2005, Galfano filed a motion for class certification. Galfano sought to certify the following class: "All persons who purchased Listerine with labels that state 'as effective as floss,' in California, from June 28, 2004 through January 7, 2005 ('the Class Period')."

---

[3] On November 2, 2004, the electorate approved Proposition 64, which amended the standing requirements of the UCL and the FAL. (§§ 17200 et seq., 17203, 17204, 17500 et seq., 17535.) Galfano commenced this action *after* the effective date of Proposition 64. There is no contention that Proposition 64 is not fully applicable to this case.

In seeking class certification, Galfano contended the class is ascertainable, the class is so numerous as to render joinder impracticable, an overwhelming community of interests exists among the class, the class representative has claims typical of the class, and the named plaintiff and his counsel adequately represent the class.

3. *Pfizer's opposition to class certification.*

Pfizer opposed class certification, arguing the case is replete with factual issues that only can be determined upon individual inquiry of each class member, and which individual inquiries predominate over any common issues. Pfizer enumerated those issues as follows: whether each class member saw or read a label; if so, *which* of the labels was seen or read; whether the consumer was deceived or misled by, or relied on, the label; if so, whether that was part of the bargain and caused the consumer to buy Listerine; if so, whether the consumer suffered injury in fact and lost money or property as a result of the alleged deception or reliance; and if so, the amount of damages or restitution, given that prices vary and most consumers will not have records of the price(s) they paid.

Pfizer reasoned that a consumer may have purchased Listerine not because of any alleged deception "but because he was brand loyal, he wanted a breath freshener, his dentist recommended it, due to a price promotion, or because the consumer read the label's admonition to 'floss daily' or 'not a replacement for floss' and did not take away any alleged deceptive message, each of which is an individual issue that cannot be resolved on a class-wide basis."

4. *Trial court's ruling.*

After hearing the matter, the trial court issued an order on November 22, 2005, certifying a broad class, on an opt-out basis, consisting "of all persons who purchased Listerine, in California, from June 2004 through January 7, 2005."

In its written ruling, the trial court noted "[w]hile Proposition 64 amended [section] 17204's standing requirements to prosecute UCL claims (by mandating that a private party suffer an 'injury in fact' and lose money or property as a result of the practice), *whether the standing requirements for class members also changed under the UCL is an open issue*." (Italics added.)

The trial court reserved jurisdiction to modify the class definition, decertify the class, or replace Galfano with a new class representative. In certifying the class, the trial court also severed the breach of warranty claim, pending determination of the viability of the UCL claims in subsequent phases of the proceedings.

The trial court also expressed numerous 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)."

Despite its stated reservations, the trial court certified the class in accordance with Galfano's broad definition.

5. *Pfizer's writ petition.*

On December 29, 2005, Pfizer filed the instant petition for writ of mandate, seeking vacation of the trial court's order and entry of a new order denying class certification.

This court issued an order to show cause.[4]

CONTENTIONS

Pfizer contends the trial court erred in certifying the class because under Proposition 64, one who maintains an action under the UCL must have suffered injury in fact and have lost money or property as a result of the unfair competition (§ 17204), and this standing requirement applies equally to the named plaintiff and to all class members.[5]

DISCUSSION

1. *Prior law and perceived abuses.*

Section 17200 defines "unfair competition" to include "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of . . . the Business and Professions Code."

Prior to the enactment of Proposition 64, the UCL authorized *any person* to sue on behalf of the general public. Former section 17204 provided: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel . . . or any city attorney . . . *or by any person acting for the interests of itself, its members or the general public.*" (Stats. 1993, ch. 926, § 2, italics added.)

---

4 A defendant generally has the right to have class certification issues resolved before the merits of an action are decided. (*Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 262.)

5 By way of additional arguments, Pfizer contends the trial court abused its discretion in finding that common issues predominate over individual ones, that Galfano's claims are typical, that Galfano is an adequate class representative, that class treatment will provide substantial benefits, and in finding an ascertainable class.

Similarly, former section 17535, within the FAL (§ 17500 et seq.) permitted an action to be brought "*by any person* acting for the interests of itself, its members, or the general public." (Stats. 1972, ch. 711, p. 1300, § 3, italics added.)

To state a cause of action under the UCL (§ 17200 et seq.) or the FAL (§ 17500 et seq.) for injunctive relief, allegations of actual deception, reasonable reliance and damage were unnecessary (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211) and a private plaintiff who had not suffered any injury could sue to obtain relief for others. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc., supra,* 17 Cal.4th at p. 561.)

This state of the law led to perceived abuses which Proposition 64 sought to remedy. The ballot argument in favor of Proposition 64 states the initiative was intended to "PROTECT SMALL BUSINESSES FROM FRIVOLOUS LAWSUITS—CLOSE THE SHAKEDOWN LOOPHOLE. [¶] There's a LOOPHOLE IN CALIFORNIA LAW that allows private lawyers to file frivolous lawsuits against small businesses even though they have no client or evidence that anyone was damaged or misled." (Ballot Pamp., General Elec. (Nov. 2, 2004) Ballot Argument in Favor of Prop. 64, p. 40.)

2. *Proposition 64 allows private enforcement only if an individual actually was injured and suffered financial or property loss as a result of the unfair competition or false advertising; it also requires private enforcement actions to meet class action requirements.*

a. *Proposition 64 restricts private enforcement to an individual who has suffered injury in fact and lost money or property as a result of unfair competition or false advertising.*

Proposition 64 amended section 17204 to provide: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel . . . or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint 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." (§ 17204, as amended by Prop. 64, § 3, approved Nov. 2, 2004, eff. Nov. 3, 2004; italics added.)

Similarly, Proposition 64 amended section 17535, within the FAL (§ 17500 et seq.) to provide in relevant part: "Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint 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.*" (§ 17535, as amended by Prop. 64, § 5, approved Nov. 2, 2004, eff. Nov. 3, 2004; italics added.)

Thus, Proposition 64 now prohibits any person, other than the Attorney General or local public prosecutors from bringing a lawsuit under the UCL or the FAL unless the person has suffered injury and lost money or property as a result of such violations. (Ballot Pamp., General Elec. (Nov. 2, 2004) Prop. 64 Analysis by Legislative Analyst, p. 38.)

b. *Proposition 64 also requires private representative actions to meet the requirements of class action lawsuits.*

In addition to restricting who can sue for unfair competition or false advertising, Proposition 64 requires private representative claims to satisfy procedural requirements applicable to class action lawsuits.

Section 17203, as amended by Proposition 64, provides: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, 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 in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. *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, [6] *but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.* (§ 17203, as amended by Prop. 64, § 2, approved Nov. 2, 2004, eff. Nov. 3, 2004; italics added.)

Similarly, Proposition 64 amended section 17535, within the FAL (§ 17500 et seq.) to provide in relevant part: "Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint 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, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*" (§ 17535, as amended by Prop. 64, § 5, approved Nov. 2, 2004, eff. Nov. 3, 2004; italics added.)

With regard to these changes, the legislative analysis in the official ballot pamphlet explained: "Currently, persons initiating unfair competition lawsuits do not have to meet the requirements for class action lawsuits. Requirements for a class action lawsuit include (1) certification by the court of a group of individuals as a class of persons with a common interest, (2) demonstration that there is a benefit to the parties of

---

6 Code of Civil Procedure section 382, pertaining to class actions, provides: "If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

the lawsuit and the court from having a single case, and (3) notification of all potential members of the class. [¶] . . . [¶] PROPOSAL [¶] This measure makes the following changes to the current unfair competition law: [¶] . . . [¶] *Requires Lawsuits Brought on Behalf of Others to Be Class Actions.* This measure requires that unfair competition lawsuits initiated by any person, other than the Attorney General and local public prosecutors, on behalf of others, meet the additional requirements of class action lawsuits." (Ballot Pamp., General Elec. (Nov. 2, 2004) Prop. 64 Ballot Analysis by Legislative Analyst, pp. 38-39, original italics.)

c. *Class action requirements; class representative must have claims typical of the class; therefore, all class members, not merely class representative, must have suffered injury in fact and lost money or property due to the unfair competition or false advertising.*

Section 382 of the Code of Civil Procedure authorizes class suits in California when " 'the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.' " (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913.) The burden is on the party seeking certification to establish the existence of both an ascertainable class and a well-defined community of interest among the class members. (*Ibid.*)

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." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470, italics added; accord *Washington Mutual Bank v. Superior Court, supra,* 24 Cal.4th at p. 913.)

Galfano and the Attorney General take the position that only the class representative must meet the new standing requirements of Proposition 64, i.e., have suffered injury in fact and lost money or property as a result of the unfair competition or false advertising (§§ 17204, 17535); however, there is no requirement that other class members meet this standing requirement.

The argument is unpersuasive. It is a basic principle that "[e]ach class member must have standing to bring the suit in his own right." (*Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73.) This is because a class action is "merely a procedural device for consolidating matters properly before the court." (*Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 716.)

If Galfano alone, but not class members, suffered injury in fact and lost money or property as a result of Pfizer's alleged unfair competition or false advertising, then by definition his claim would not be typical of the class. Rather, Galfano's claim would be demonstrably *atypical*.

As explained, Proposition 64 requires private representative actions to satisfy the procedural requirements applicable to class action lawsuits. (Ballot Pamp., General Elec. (Nov. 2, 2004) Prop. 64 Official Title & Summary, p. 38.) In order to meet the "community of interest" requirement of Code of Civil Procedure section 382, which requires, inter alia, the class representative to have claims *typical* of the class, it is insufficient if the class representative alone suffered injury in fact and lost money or property as a result of the violation. (§§ 17204, 17535.) The class members being represented by the named plaintiff likewise must have suffered injury in fact and lost money or property as a result of the unfair competition or false advertising. (*Ibid.*)

d. *The effect of Proposition 64's requirement of "injury in fact" on the rule that one could state a claim under the UCL or the FAL based on the mere likelihood that members of the public would be deceived; private individuals who have not suffered any injury in fact and who have not lost money or property as a result of an alleged fraudulent business practice or false advertising cannot state a cause of action based merely on the likelihood that members of the public will be deceived.*

Historically, in order to state a cause of action under either the UCL or the FAL, case law only required a showing that " 'members of the public [were] *likely to be deceived*.' [Citations.]" (*Committee on Children's Television, Inc. v. General Foods Corp., supra,* 35 Cal.3d at p. 211, italics added.) Allegations of actual deception, reasonable reliance and damage were unnecessary. (*Ibid.*)

The issue is whether the "likely to be deceived" standard can be reconciled with Proposition 64's new standing requirements.

As discussed, Proposition 64 prohibits any person, other than the Attorney General or local public prosecutors, from bringing a lawsuit for unfair competition or false advertising unless the person has suffered "injury in fact" and has lost money or property as a result of such violation. (§§ 17204, 17535, as amended by Prop. 64, §§ 3, 5, approved Nov. 2, 2004, eff. Nov. 3, 2004.) Further, Proposition 64 requires that such actions initiated by any person, other than the Attorney General and local public prosecutors, on behalf of others, meet the additional requirements of class action lawsuits. (§ 17203, 17535, as amended by Prop. 64, §§ 2, 5, approved Nov. 2, 2004, eff. Nov. 3, 2004.) In order to meet the "community of interest" requirement of Code of Civil Procedure section 382, the class members being represented by the named plaintiff likewise must have suffered injury in fact and lost money or property as a result of the unfair competition or false advertising. (§§ 17204, 17535.)

Therefore, unless an action under the UCL or the FAL is brought by the Attorney General or local public prosecutors, the mere likelihood of harm to members of the public is no longer sufficient for standing to sue. Persons who have not suffered any "injury in fact" and who have not lost money or property as a result of an alleged fraudulent business practice or false advertising (§§ 17204, 17535) cannot state a cause of action based merely on the "likelihood" that members of the public will be deceived.

e. *Post-Proposition 64 state cases cited by Galfano are unavailing.*

In support of his contention the "likely to be deceived" standard is unchanged, Galfano cites four post-Proposition 64 Court of Appeal decisions: *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 285, footnote 4 (*Progressive*); *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 484; *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 682; and *Bell v. Blue Cross of California* (2005) 131 Cal.App.4th 211, 221. Galfano's reliance on these decisions is misplaced. It is established that "[l]anguage used in any opinion is of course to be understood in the light

of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

In *Progressive, supra*, 135 Cal.App.4th at page 271, Preciado alleged in his cross-complaint that Progressive's conduct violated section 17200 as an unlawful, unfair or fraudulent business practice. The cross-complaint alleged: "Progressive has a 'pattern and practice of seeking med-pay reimbursement even though it never engaged in any discussion, analysis or conclusion that the injured party has in fact been made whole' and 'continues to seek[ ] sums it is not entitled to as a matter of law to further its unlawful scheme.' Further, . . . Progressive has a 'pattern and practice of ignoring California law by seeking 100% reimbursement for the amounts paid under its med-pay provision. This systematic scheme is contrary to law, and is nothing more than a sharp, illicit business practice.' . . . Progressive fails to investigate claims, fails to properly explain policy benefits, misled Preciado and misrepresented material facts pertaining to his claim, imposes unacceptably high reimbursement amounts, and forced Preciado to retain attorneys and incur economic damages to receive proper benefits under the policy." (*Progressive, supra*, at pp. 271-272.

Progressive held Preciado stated a cause of action under section 17200 for unfair or fraudulent business practices. (*Progressive, supra,* 135 Cal.App.4th at pp. 283-285.) In its discussion, *Progressive* relied on the principle that "[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*.' [Citation.] . . . 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.]' [Citation.]" (*Id.* at p. 284, italics added.)

However, *Progressive* does not acknowledge Proposition 64, except for the following statement in a footnote: "We express no opinion as to whether Preciado's attorney fees constitute 'injury in fact' as required under section 17204. Preciado has alleged that the conduct has forced him to incur 'economic damages' in addition to attorney fees." (*Progressive, supra,* 135 Cal.App.4th at p. 285, fn. 5.)

As for *Wayne v. Staples, Inc., supra,* 135 Cal.App.4th at page 484, *Colgan v. Leatherman Tool Group, Inc., supra*, 135 Cal.App.4th at page 682, and *Bell v. Blue Cross of California, supra,* 131 Cal.App.4th at page 221, Galfano acknowledges those cases, although they apply the traditional "likely to be deceived" standard, do not address the effect of Proposition 64.

Therefore, the cited decisions are not authority with respect to the impact of Proposition 64 on the "likely to be deceived" standard.

f. *The requirement a plaintiff suffered "injury in fact . . . as a result of" the fraudulent business practice or false advertising means that a plaintiff must have actually relied on the misrepresentation in entering into the transaction.*

Galfano and Pfizer also differ as to whether Proposition 64 added a reliance element to the UCL and the FAL. Pfizer has the better argument.

Inherent in Proposition 64's requirement that a plaintiff suffered "injury in fact . . . *as a result of*" the fraudulent business practice or false advertising (§§ 17204, 17535, italics added) is that a plaintiff actually *relied* on the misrepresentation and as a result, was injured thereby.[7] Here, for example, to have suffered an injury in fact as a result of the alleged misrepresentation, a plaintiff would have had to read Pfizer's label "as effective as floss against plaque and gingivitis" or some similar statement and relied thereon in buying Listerine. A consumer who was unaware of, or who did not rely upon,

---

7 Similarly, an element of both actionable fraud and negligent misrepresentation is damage, i.e., pecuniary or property loss, resulting from *reliance* on the misrepresentation. (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 816, 818.)

Pfizer's claims comparing Listerine to floss did not suffer any "injury in fact" as a result of the alleged fraudulent business practice or false advertising.

We note that in *Anunziato v. eMachines, Inc.* (C.D.Cal. 2005) 402 F.Supp.2d 1133, a post-Proposition 64 case, the district court reached a contrary conclusion. *Anunziato* held "reading reliance into the UCL and the FAL would subvert the public protection aspect of those statutes." (*Id.* at p. 1137.)

Anunziato reasoned: "[T]he Court can envision 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. One common form of UCL or FAL claim is a 'short weight' or 'short count' claim. For example, a box of cookies may indicate that it weighs sixteen ounces and contains twenty-four cookies, but actually be short. Even in this day of increased consumer awareness, not every consumer reads every label. If actual reliance were required, a consumer who did not read the label and rely on the count and weight representations would be barred from proceeding under the UCL or the FAL because he or she could not claim reliance on the representation in making his or her purchase. Yet the consumer would be harmed as a result of the falsity of the representation." (*Anunziato v. eMachines, Inc., supra,* 402 F.Supp.2d at p. 1137.)

While *Anunziato* expressed an understandable concern, it would appear the court substituted its judgment for that of the voters and based its decision on the perceived ill effects a "reliance" requirement would have in hypothetical fact situations.

In view of Proposition 64's express requirement that a plaintiff suffered "injury in fact . . . *as a result of*" the fraudulent business practice or false advertising (§§ 17204, 17535, italics added), we believe the district court's decision in *Laster v. T-Mobile USA Inc.* (S.D.Cal. 2005) 407 F.Supp.2d 1181, sets forth the correct interpretation.

Laster held "[b]ecause Plaintiffs fail to allege they actually relied on false or misleading advertisements, they fail to adequately allege causation as required by Proposition 64." (*Laster v. T-Mobile USA Inc., supra,* 407 F.Supp.2d at p. 1194.) *Laster* noted the plaintiffs failed to allege they "relied on Defendants' advertisements in entering into the transactions. While Plaintiffs meticulously describe the allegedly misleading advertisements (as later described in Plaintiffs' pleadings, a 'bait-and-switch' leading to a 'fleece'), none of the named Plaintiffs allege that they saw, read, or in any way relied on the advertisements; nor do they allege that they entered into the transaction *as a result* of those advertisements." (*Ibid.*)

Accordingly, the requirement a plaintiff suffered "injury in fact . . . *as a result of*" the fraudulent business practice or false advertising (§§ 17204, 17535, italics added) means that Galfano or others must have purchased the Listerine in reliance on the allegedly false or misleading representations or advertisements and as a result suffered injury.

CONCLUSION

For the reasons stated above, we conclude the trial court erred as a matter of law in certifying a class of "all persons who purchased Listerine, in California, from June 2004 through January 7, 2005." In view of the changes in the law brought about by Proposition 64, the class definition is plainly overbroad and must be set aside.[8] [9]

---

[8] We note the class definition, extending to anyone who purchased Listerine in California within a six-month period, is overbroad for other reasons as well. For example, Pfizer's opposition papers showed that of 34 different Listerine mouthwash bottles, 19 never included any label that made any statement comparing Listerine mouthwash to floss. Further, even as to those flavors and sizes of Listerine mouthwash bottles on which Pfizer did place the labels which are at issue herein, not every bottle shipped between June 2004 and January 2005 bore such a label.

[9] Our ruling herein is without prejudice to Galfano's bringing a new motion for class certification, consistent with the principles set forth in this opinion.

We recognize this initiative measure, which was promoted as adding a standing requirement to the UCL and FAL, has had the effect of dramatically restricting these consumer protection measures. For example, as the district court recognized in *Anunziato*, the addition of a reliance requirement may preclude a consumer who did not read and rely on a label from stating a UCL or FAL claim in a " 'short weight' " or " 'short count' " case. (*Anunziato v. eMachines, Inc., supra,* 402 F.Supp.2d at p. 1137.) However, this court must take the statutory language as it finds it. Given the new restrictions on private enforcement under the UCL and the FAL, enforcement of these statutes in legitimate cases is increasingly the responsibility of a vigilant state Attorney General and/or local public prosecutors.[10]

---

10 This case illustrates some of the shortcomings of the initiative process. "When a statute enacted by the initiative process is involved, the Legislature may amend it only if the voters specifically gave the Legislature that power, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. (Cal. Const., art. II, § 10, subd. (c); *Amwest* [*Surety Ins. Co. v. Wilson* (1995)] 11 Cal.4th 1243, 1251.)" (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1483-1484.) Proposition 64 does not include a provision empowering the Legislature to amend it.

DISPOSITION

The order to show cause is discharged. The petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing respondent superior court to vacate its November 22, 2005 order granting Galfano's motion for class certification and to enter a new and different order denying the motion. Pfizer shall recover its costs in this proceeding. (Cal. Rules of Court, rule 56(*l*).)

CERTIFIED FOR PUBLICATION

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.

PROOF OF SERVICE

Re: Case No.: _____

Case Title: Pfizer, Inc. v. Superior Court

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the County of Los Angeles and my business address is 444 West Ocean Boulevard, Suite 1614, Long Beach, California 90802-4524.

On August 11, 2006, I served the attached document described as:

PETITION FOR REVIEW

APPENDIX OF FOREIGN AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW

on the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes. I then caused the envelopes to be delivered by personal service, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I, Liz Brown, declare under penalty of perjury that the foregoing is true and correct.

Executed on August 11, 2006, at Long Beach, California.

Liz Brown

LIZ BROWN

Service List

Jeffrey Gordon
KAYE SCHOLER LLP
1999 Avenue of the Stars, Suite 1700
Los Angeles, California 90067

Attorneys for Defendant Pfizer, Inc.

Court of Appeal 2nd District
Ronald Regan State Building
300 South Spring Street, 2nd Floor
Division 3
Los Angeles, California 90013

Ronald A. Reiter
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-3664

Office of the District Attorney
Los Angeles County
210 West Temple Street, 18th Floor
Los Angeles, California 90012

The Honorable Carl J. West
Los Angeles County Superior Court
Central Civil West Courthouse
600 South Commonwealth Avenue
Department 311
Los Angeles, California 90005

PROOF OF SERVICE

Re: Case No.: _____

Case Title: Pfizer, Inc. v. Superior Court

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the County of Los Angeles and my business address is 444 West Ocean Boulevard, Suite 1614, Long Beach, California 90802-4524.

On August 11, 2006, I served the attached document described as:

PETITION FOR REVIEW

APPENDIX OF FOREIGN AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW

on the parties in the above-named case. I did this by enclosing true copies of the document in a sealed envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier, addressed as follows:

Thomas A. Smart
Richard A. De Sevo
Kay Scholer LLP
425 Park Avenue
New York, New York 10022

Attorneys for Defendant Pfizer, Inc.

I, Liz Brown, declare under penalty of perjury that the foregoing is true and correct.

Executed on August 11, 2006, at Long Beach, California.

Liz Brown

LIZ BROWN