COURT OF APPEAL CASE NO. B188106
(Los Angeles Superior Court *Steve Galfano v. Pfizer Inc.*, Case No. BC 327114)

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION THREE

PFIZER INC.,

Petitioner,

vs.

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

Respondent,

STEVE GALFANO,

Real Party in Interest.

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

PETITIONER'S RESPONSE

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Just as the Respondent Court failed to do below, not once in his 44-page opposition ("Oppos.") does plaintiff Steve Galfano (the Real Party in Interest) address the key language of Proposition 64 at issue on this appeal – that the plaintiff's injury in fact and loss of money must be "as a result" of the alleged violation of the UCL. Instead, he boldly contends that this central language in Proposition 64 has no effect on class members who, according to Mr. Galfano, need not have suffered any injury in fact and loss of money or property as a result of the alleged violation of §17200 or §17500 to recover under those statutes. (Oppos. 22). Under this theory, the "injury in fact" and "has lost money or property as a result of" language is read out of the new UCL, except solely as it relates to the named plaintiff.[1] Plaintiff likewise argues, contrary to existing California law – which he also ignores – that class members need not have standing themselves to recover.

In other words, according to Mr. Galfano, the 61% of those questioned about the first of three Listerine labels at issue in the survey the *plaintiff* submitted in the *McNeil* litigation (83% when the control is factored in) who were *not* mislead into believing that Listerine "can replace the use of floss" (EXP 048 ¶12), are still entitled to restitution even though

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[1] Moreover, Mr. Galfano's brief at times seems also to suggest that all the named plaintiff must show is "injury in fact" without demonstrating that the injury was proximately caused by violation of §17200 or §17500. (Oppos. 12).

they were not deceived and suffered no injury and loss whatsoever. Under plaintiff's remarkable theory, an individual who was not deceived or injured and who suffered no loss by reason of any alleged false statement could not sue as a named plaintiff under §17200 or §17500 after Proposition 64, but that same individual would be entitled to restitution as a member of the class. As explained below, this extraordinary theory of strict liability is directly at odds with the express language of Proposition 64, would turn Proposition 64 on its head and eviscerate its purpose, and is contrary to controlling California Supreme Court and Court of Appeal authority.

In addition to not addressing the language of the statute at issue, plaintiff mistakenly and repeatedly claims that all labels and all television commercials contained a single, uniform allegedly false statement. That is simply not so. It is undisputed that not all bottles of Listerine during the time in question contained any "as effective as floss claim," and the four different television commercials and three different labels contained different advertising claims, including, in some instances, express statements that Listerine "is not a replacement for floss" and "floss daily." (Pfizer's Petition ("Pet.") at 21-22). That is why the complaint alleges that the challenged ads and labels "creat[ed] a false *impression*" that Listerine was a substitute for floss. (EXP 048 ¶12) (emphasis added). Thus, it is impossible to determine whether any member of the class was deceived and injured

without questioning each class member individually about which label or advertisement he saw, what message, if any, he took away about flossing, and whether he stopped flossing or stopped buying floss as a result. It is, thus, not surprising that nowhere does plaintiff attempt to explain *how* these and the host of other individual issues outlined in Pfizer's Petition can manageably be resolved with classwide proof and without the need for individual inquiries of members of the class.

Nor, given these individual issues, is it surprising that two other courts, when faced with virtually identical allegations, denied class certification. Thus, in addition to the New York court in the *Whalen* case (*see* Pet. 7-8; EXP 080, 1442-55), the Circuit Court in Chicago denied certification. *Elder v. Pfizer Inc.*, No. 05CH633 (Cir. Ct. Cook County, Ill. Feb. 17, 2006).[2] Significantly, both the New York and Illinois statutes are similar to the UCL and, indeed, the Illinois statue contains the identical "as a result of" language as does Proposition 64. (*See* pp. 8-9, *infra*; Pet. 7 n.2). In denying certification of the consumer fraud claim, the Court in *Elder* concluded:

> . . . proof of proximate causation and actual deception of the individual members of the class would predominate over the common issues. This would involve individual inquiries into whether each member of the class saw, heard, or read the ads

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[2] A copy of the *Elder* decision accompanies this Response in Pfizer's submission of Foreign Authorities.

in question, were deceived by them, and then suffered injury because of them. (*Elder*, at 9).

The Court also denied the plaintiff's motion for certification of a breach of written warranty claim under the Magnuson-Moss Act, which is the same as plaintiff's express warranty claim: "[T]he court finds individual questions would predominate over any common warranty question; namely, the extent of each member's reliance on the alleged warranty and whether it became the 'basis of the bargain.'" (*Id.* at 12).

As explained below and in Pfizer's Petition, the same is true here. Accordingly, the writ of mandate should be granted and the order below vacated.

ARGUMENT

I.

THE RESPONDENT COURT COMMITTED PLAIN LEGAL ERROR IN INTERPRETING PROPOSITION 64

A. Plaintiff's Total Failure to Interpret the Statutory Provision at Issue

Proposition 64 made three key changes to the UCL. It required that anyone asserting a claim under §17200 or §17500 (1) have "suffered injury in fact," (2) have "lost money or property," and (3) that this injury in fact and loss of money or property be "as a result of such unfair competition." Plaintiff concedes that it is black letter law that the "first step" in statutory construction is to "scrutinize the actual words of the statute, giving them a

plain and commonsense meaning" and that a statute cannot be interpreted to "render particular terms mere surplusage," but must be interpreted "to give significance to every word." (Oppos. 21) (*See* Pet. 30-31). Yet at the same time, nowhere in his brief does plaintiff even attempt to explain what the phrase "as a result of" means, let alone engage in *any* statutory interpretation analysis.

The reason for this silence is not difficult to discern. As explained in Pfizer's Petition, applying the recognized canons of statutory construction, the phrase "as a result of" means that the plaintiff must establish that the defendant's unfair competition proximately *caused* the plaintiff's "injury in fact" and "los[s of] money or property." (*See* Pet. 29-31).

In addition to ignoring the text of Proposition 64, Mr. Galfano ignores the Court of Appeal's holding that the identical "as a result of" language in the Consumer Legal Remedies Act ("CLRA") "mak[es] causation a necessary element of proof." *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal.App.4th 746, 753-54 (2003). (*See* Pet. 31). Plaintiff also ignores the numerous decisions from other states holding that the identical "as a result of" language requires a showing of proximately caused injury. (*See* Pet. 7 n.2).

What is more, plaintiff ignores that among the "findings and declarations of purpose" that the "people of the State of California [did]

find and declare" in Proposition 64 were that Sections 17200 and 17500 "are being misused by some private attorneys who . . . [f]ile lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision" and that "[i]t is the intent of California voters in enacting this act that *only* the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." Prop. 64 §§ 1(b)(4), 1(f) (emphasis added). Accepting plaintiff's view of Proposition 64 – that a class member can recover money even though he was *not* misled by the challenged ad and even though the alleged false ad did *not* proximately cause him "injury in fact" and "los[s] of money or property" – would effectively convert private class actions into the old representative actions that Proposition 64 was expressly designed to eliminate.

In short, it is remarkable that, in a case where one of the key issues is the proper interpretation of a statutory amendment – an issue plaintiff concedes is subject to *de novo* review (Oppos. 13 n.3) – neither the Respondent Court nor plaintiff even attempt to interpret the amendment. The bottom line is that the plain meaning of the phrase "as a result of" is that the plaintiff must prove that the UCL violation was a proximate cause of his injury and loss of money. This plain meaning is, of course, consistent with the plain meaning of the identical language in the CLRA.

B. Plaintiff's Misplaced Reliance on a Federal District Court Decision and on State Court Decisions that Concededly Do Not Address Proposition 64

Unable to offer any meaning to the phrase "as a result of," plaintiff refers to a single federal district court decision, *Anunziato v. eMachines, Inc.*, 402 F. Supp.2d 1133 (C.D. Cal. 2005), while ignoring another California federal district court decision that holds directly to the contrary, *Laster v. T-Mobile USA, Inc.*, 407 F. Supp.2d 1181 (S.D. Cal. 2005). (*See* Oppos. 10). In addition, plaintiff refers to post-Proposition 64 state court decisions, which, plaintiff concedes (Oppos. 13), do *not* address the applicability of Proposition 64.

1. The Federal Court Decisions

In *Anunziato*, the plaintiff, on behalf of a putative class of purchasers, alleged that the defendant's laptop computers had a defect causing some of them to overheat. Plaintiff asserted a number of claims under California law, including claims under §17200 and §17500. Defendant moved to dismiss on the grounds that plaintiff had failed to allege that he was harmed "as a result of" the violations of §17200 and §17500, as required by Proposition 64, and that this requirement could only be met by pleading "reliance." 402 F. Supp.2d at 1137. The district court rejected this argument, reasoning that there could be cases in which a plaintiff who did not

rely on an ad was nonetheless injured by it, and concluded, without analysis, "that harm in fact will meet the 'as a result of' requirement." *Id.*

In doing so, the district court confused the concepts of "reliance" and "causation" and ignored the "as a result of" requirement imposed by Proposition 64. Although reliance and causation often overlap in false advertising cases, they are not always the same thing. Causation means that a person is injured as a result of the falsity of the advertising claim. Reliance is a requirement that the plaintiff allege that he bought the product because of the alleged false statement in question. As New York's highest court explained in interpreting that state's consumer fraud statute (N.Y. GEN. BUS. L. §349):

> Reliance and causation are twin concepts, but they are not identical. . . . [T]here is a difference between reliance and causation, as illustrated by the facts of this case. Here, plaintiffs allege that because of defendant's deceptive act, they were forced to pay a $275 fee that they had been led to believe was not required. In other words, plaintiffs allege that defendant's material deception caused them to suffer a $275 loss. This allegation satisfies the causation requirement. Plaintiffs need not additionally allege that they would not otherwise have entered into the transaction. Nothing more is required.

Stutman v. Chemical Bank, 95 N.Y.2d 24, 30, 731 N.E.2d 608, 612-13 (2000). Significantly, contrary to plaintiff's assertion (Oppos. 34), New York's statute is not "materially different" from §17200 and §17500. Thus, as the Court stated in *Stutman*, "reliance is not an element of a section 349

claim," the "'deceptive practice must be 'likely to mislead a reasonable consumer acting reasonably under the circumstances," and the plaintiff must prove that he "suffered injury *as a result of* the deceptive act." 95 N.Y.2d at 29, 731 N.E.2d at 611-12 (emphasis added).

Applying this reliance/causation distinction to the first Listerine label as an example, and assuming that a consumer who saw the label could prove that the claim "Clinically Proven" to be "As Effective As Floss Against Plaque and Gingivitis Between Teeth" is false or misleading, to succeed on his §17200 or §17500 claim, he would not have to show that he purchased the product because of the claim, *i.e.*, that he relied on the claim in making his purchasing decision. He would, however, have to show that he read and was deceived by the claim, even though he may have bought the product for an unrelated reason. To show injury, he would have to show that the falsity of the claim proximately caused him injury.

Here, however, plaintiff does not allege that he suffered injury proximately caused by the falsity of the challenged claim. Thus, for example, he does not assert that the value of the Listerine he purchased was lessened because he incurred additional costs (*e.g.*,dental bills) as a result of the alleged claim that Listerine is a substitute for floss. This absence of allegation of *how* he suffered "injury in fact" and "loss of money" is telling. As the U.S. Supreme Court recently stated, "it should not prove burdensome

for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627, 1634 (2005). Indeed, when faced in *Elder* with the same kind of lack of allegation of injury, the Court concluded that the plaintiff had failed to allege "that he was harmed in any 'concrete, ascertainable way.'" (*Elder*, at 9).

Equating causation with reliance, the federal district court in *Anunziato* also rejected causation as an element of §17200 and §17500 claims based on its attempted distinction of the Court of Appeal's decisions in *Wilens* and *Caro v. Procter & Gamble Co.*, 18 Cal.App.4th 644 (1993). 402 F. Supp.2d at 1137. Once again, its analysis is flawed. The court asserted that those decisions are distinguishable because they arise under the CLRA. But, as noted above, both the CLRA and Proposition 64 use the identical "as a result of" language. Significantly, also, the court (and plaintiff (Oppos. 32-34)) ignore that one of the claims at issue in *Caro* was a §17200 claim. 18 Cal.App.4th at 652.

At bottom, the court in *Anunziato* rejected the express causation requirement of Proposition 64 because it improperly engaged in its own policy analysis and found what it believed to be the better public policy. At the same time, however, it conceded that "there is a legitimate basis for requiring reliance and causation where the plaintiff seeks monetary relief,"

but not where the plaintiff seeks restitution. 402 F. Supp.2d at 1137-38. But the court made no attempt to explain why this should be so, or where in the pertinent statutes it finds a basis for this distinction. In all events, a court is not free to substitute its policy judgments for those of the Legislature or, in this case, for those of the people of California acting directly through a citizen proposition. If the court and the plaintiff disagree with the proximate causation requirement of Proposition 64, the remedy is at the ballot box, not in ignoring the plain language of the Proposition.

Turning to the other federal district court decision, *Laster*, which plaintiff ignores, the court examined the actual language of Proposition 64: A plaintiff "must show that (1) she has suffered actual injury in fact, and (2) such injury occurred as a result of the defendant's alleged unfair competition or false advertising." 407 F. Supp.2d at 1194. With respect to the second requirement, the court gave it its express meaning: "The language of the UCL, as amended by Proposition 64, makes clear that a showing of causation is required . . . ." *Id.* Applying these statutory requirements to the case before it, the court dismissed the UCL claims because the plaintiff "sufficiently allege[d] injury in fact," but "fail[ed] adequately to allege causation." *Id.*[3]

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[3] To be sure, the district court in *Laster*, like the court in *Annunziato*, equated reliance with causation in holding that causation must be

(continued...)

2. The State Court Decisions

Also misplaced is plaintiff's reliance on four post-Proposition 64 Court of Appeals decisions. *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663 (2006); *Wayne v. Staples, Inc.*, 135 Cal.App.4th 466 (2006); *Progressive West Ins. Co. v. Superior Ct.*, 135 Cal.App.4th 263 (2005); *Bell v. Blue Cross of Calif.*, 131 Cal.App.4th 211 (2005).

To begin with, as plaintiff concedes (Oppos. 13), none of the decisions addresses the meaning of the "as a result of" or other language of Proposition 64 amending the UCL. Indeed, one of the decisions affirmatively states that because the defendant did not raise the issue of the Proposition's application, the Court was not addressing it. *Colgan*, 135 Cal.App.4th at 701 n.26. In short, the issue before this Court – the meaning of the amend-

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[3] (...continued)
alleged. 407 F. Supp.2d at 1194. This is understandable because there are numerous situations in which if a plaintiff did not see an advertised statement and was not deceived by it, he was not injured by it. That same failure to see the ad means that the individual did not rely on it either. To the extent that on the facts of a particular case reliance and causation overlap or are equivalent, given the express language of Proposition 64 , then in that case such reliance/causation must be shown or else the "as a result of" requirement would be read out of the statute. *See Cal. Teachers Ass'n v. Governing Bd.*, 14 Cal.4th 627, 634 (1997) ("'In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose.'").

ing language of Proposition 64 – had nothing to do with the Courts' decisions and the decisions, thus, have no bearing on this appeal.

In all events, plaintiff's selective reading of the decisions provides no support for his argument that Proposition 64 does not mean what it says. Plaintiff argues that these cases stand for the proposition that all that a plaintiff must prove to succeed on a §17200 or §17500 claim is that members of the public are "likely to be deceived." (*See, e.g.*, Oppos. 18-19). In doing so, plaintiff confuses the standard for determining whether a representation violates the statute with the separate requirements of causation, injury in fact and loss of money or property imposed by Proposition 64 as a condition for monetary recovery. Whether an advertisement has the capacity to deceive – *i.e.*, whether the ad is "likely to deceive the reasonable person to whom the [ad] is directed" (*Bell*, 131 Cal.App.4th at 221) – is the standard for determining whether the ad violates the prohibitions in §17200 and §17500 and, thus, is enjoinable either in a private action or in an action by the Attorney General. Indeed, the courts apply the same standard under the CLRA as under the UCL to determine whether conduct violates that statute – a statement that is "likely to mislead a reasonable consumer" violates the statute, *Nagel v. Twin Labs., Inc.*, 109 Cal.App.4th 39, 54 (2003). Moreover, the CLRA, like the UCL, is to be "liberally construed and applied to promote its underlying purposes, which are to protect consumers

against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." CAL. CIV. CODE §1760. *See Wang v. Massey Chevrolet*, 97 Cal.App.4th 856, 869 (2002). Nonetheless, as we have already shown (*see* p. 5, *supra*), the Court of Appeal has held that the identical "as a result of" language in the CLRA "mak[es] causation a necessary element of proof." *Wilens*, 120 Cal.App.4th at 754. (*See* Pet. 31).

None of the cases plaintiff cites even hints, let alone holds, that a plaintiff can recover money even though he did not, as Proposition 64 expressly requires, suffer "injury in fact *and* los[t] money or property *as a result of*" the misleading ad. Indeed, in *Colgan*, the Court held that there can be no restitution under the UCL *unless* there is substantial evidence showing that "'measurable amounts'" were "wrongfully taken by means of an unfair business practice." 135 Cal.App.4th at 698 (quoting *Day v. AT&T Corp.*, 63 Cal.App.4th 325, 339 (1998)). Thus, "'in the absence of a measurable loss,'" there is no basis for imposing a monetary sanction merely to achieve a deterrent effect. *Id.* (quoting *Day*, 63 Cal.App.4th at 339). Because evidence of such loss was lacking – the record "contains no evidence concerning the amount of restitution necessary to restore purchasers to the *status quo* ante" – the Court reversed the judgment for plaintiff. *Id.* at 700. Plainly, where an ad is likely to deceive the public, but a particular

plaintiff was not deceived and thus suffered no injury, there is no amount of restitution "necessary to restore [him] to the *status quo* ante."

The other decisions on which plaintiff relies likewise do not support his theory that a plaintiff who was not deceived and who was not injured can recover money on a UCL claim. Thus, in *Progressive*, the Court overruled a demurrer to a §17200 claim in which the plaintiff alleged that the defendant "misled *him* (and presumably *each* of its customers it makes these demands upon as a matter of course)" and that this conduct "forced *him* to incur 'economic damages.'" 135 Cal.App.4th at 285 & n.5 (emphasis added). In *Wayne*, the Court affirmed summary adjudication dismissing the plaintiff's §17500 claim because the challenged sales order form "was not misleading or deceptive." 135 Cal.App.4th at 484. And in *Bell*, where the Court's holding was that the plaintiff had stated a cause of action "for pleading purposes," the plaintiff physician clearly had pled injury in alleging that the defendant health insurance company paid *him* "arbitrary amounts that are substantially below the cost, value and common range of fees" for the provision of emergency care. 131 Cal.App.4th at 214, 221.

As plaintiff notes (Oppos. 16), *Bell* relied on *South Bay Chevrolet v. Gen'l Motors Acceptance Corp.*, 72 Cal.App.4th 861 (1999). In that case, the plaintiff, asserting individual and representative actions under §17200, alleged that defendant calculated loans based on a 360 day year instead of a

365 day year. Acknowledging that the plaintiff "had the burden to establish [that defendant] engaged in a business practice 'likely to deceive' the reasonable consumer to whom the practice was directed," the Court affirmed judgment for defendant because the plaintiff "knew, understood, agreed and expected that [defendant] would use the 365/360 method to calculate the interest." *Id.* at 878. That is, because the plaintiff knew the truth, it "could not be deceived" and therefore its claim under §17200 failed. *Id.* at 879.

Finally, plaintiff's strict liability interpretation of §17200 and §17500 would raise serious questions under the First Amendment and the "even 'broader and 'greater'" free speech guarantee in Article I(a) of this State's Constitution. *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468, 491 (2000). In particular, under plaintiff's theory – that a class member is entitled to restitution even if *he or she* was not deceived by the ad – everyone in the class would get restitution even though, based on the survey the plaintiff submitted in *McNeil*, only 39% of those questioned about the first of the three Listerine labels (17% when the control is factored in) were misled. It is antithetical to the First Amendment to penalize someone for providing *non*-misleading information.[4] Accordingly, under the recognized statutory

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[4] *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (advertisers "have an interest in conveying *non*-misleading information about their products to adults, and adults have a corresponding interest in receiving truthful information about . . . products"); *Vir-*
(continued...)

canon that "[i]n ascertaining the Legislature's intent, [the court] attempt[s] to construe the statute to preserve its constitutional validity,"[5] this Court, in accord with the express language of Proposition 64, should interpret the Proposition to permit monetary recovery by only those class members who were deceived by a challenged ad (and suffered injury in fact and lost money or property as a result thereof).[6]

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4 (...continued)
ginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (a state may regulate commercial speech, but "may not do so by keeping the public in ignorance" of the truth); *Gerawan*, 24 Cal.4th at 494 ("[A]rticle I's right to freedom of speech protects commercial speech, at least in the form of truthful and nonmisleading messages about lawful products").

5 *Korea Supply Co. v. Lockheed Martin Corp.* 29 Cal.4th 1134, 1146 (2003). *Accord, Frye v. Tenderloin Housing Clinic, Inc.*, 2006 Cal. LEXIS 2980, *40 (Cal. March 9, 1966) (interpreting statute to avoid "First Amendment questions").

6 We note that under the federal Lanham Act, 15 U.S.C. §1125(a), a competitor who succeeds on a trademark infringement or false advertising claim is entitled not to 100% of the defendant's profits, but only to that percentage equal to the percentage of persons whom the challenged ad misled. *See, e.g., Plasticolor Molded Products v. Ford Motor Co.*, 713 F. Supp. 1329, 1349-50 (C.D. Cal. 1989), *vacated by settlement*, 767 F. Supp. 1036 (C.D. Cal. 1991); *Burndy Corp. v. Teledyne Indus., Inc.*, 748 F.2d 767, 771 (2d Cir. 1984) ("a plaintiff who establishes false advertising in violation of §43(a) of the Lanham Act will be entitled only to such damages as were caused by the violation").

C. Plaintiff's Total Failure to Address Pfizer's Showing that Proposition 64's Requirements Apply to Class Actions as Well as to Individual Actions

In its Petition (Pet. 32-35), Pfizer demonstrated that Proposition 64 provides that the three "requirements" of injury in fact, loss of money or property and proximate causation apply to class actions "*and*" that the class certification requirements must be met. Pfizer further demonstrated that the law was plain before enactment of Proposition 64 that, because a class action "is merely a procedural device for consolidating" "individual" or "separate" "actions" of "many individuals" that otherwise would have to be "individually litigate[d],"[7] "'*[e]ach* class member must have standing to bring the suit in his own right.'" *Collins v. Safeway Stores, Inc.*, 187 Cal.App.3d 62, 73 (1986) (emphasis added). Thus, as the California Supreme Court ruled, "[c]lass actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going." *City of San Jose v. Super. Ct.*, 12 Cal.3d 447, 462 (1974).

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[7] Pet. 34 (quoting *Vernon v. Drexel Burnham & Co.*, 52 Cal.App.3d 706, 716 (1975); *Washington Mutual Bank v. Super. Ct.*, 24 Cal.4th 906, 913 (2001); *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal.4th 319, 335, 339 n.10 (2004); *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 435 (2000); *Blue Chip Stamps v. Super. Ct.*, 18 Cal.3d 381, 386 (1976); *Weaver v. Pasadena Tournament of Roses Ass'n*, 32 Cal.2d 833, 838 (1948)).

Plaintiff does not challenge (or even mention) this black letter law – even though the premise of his position and the Respondent Court's ruling is that Proposition 64's requirements of injury, loss of money or property and causation apply only to the named plaintiff and not to members of the class. (*See* EXP 010, 039; Oppos. 22). Instead, plaintiff argues that Proposition 64 "specifically allows class actions to be brought" and that this provision would be "mere surplusage" if the Proposition's requirements of injury, loss of money or property and causation were applied to class members. (Oppos. 22). This is simply not so. Proposition 64 does not "allow" class actions to be brought. Rather, it eliminates the old "representative" action which, as the Proposition states, was being "misused" by plaintiffs who had not "viewed the defendant's advertising" or had not been "injured in fact." Prop. 64 §1(b)(2)-(3). Requiring that, as the Proposition provides, to obtain "*any* relief," the requirements of injury, loss of money and causation must be satisfied, does not make the separate requirement of satisfying C.C.P 382's requirements "surplusage." It merely requires that, in both individual and class actions, each class member must satisfy the express requirements of the Proposition. Class actions can still be certified where, unlike here, the requirements of deception, injury, loss of money or property and causation can be established with common proof.

D. Plaintiff's Misplaced Reliance on Decisions Interpreting Article III of the United States Constitution

Plaintiff contends that Proposition 64 amended the UCL to impose the same "standing requirements" that Article III of the U.S. Constitution imposes under the Case or Controversy Clause. (Oppos. 23). Plaintiff, however, ignores that the U.S. Supreme Court has held that among the "three elements" of the "irreducible constitutional minimum of standing" under the Clause are "injury in fact" and causation:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant and not . . . the result [of] the independent action of some third party not before the court.

Lujan v. Secretary of the Interior, 504 U.S. 555, 560-61 (1992). In other words, a plaintiff who has not suffered "injury in fact" proximately caused by the challenged conduct – here, a plaintiff who did not see the challenged ad, who was not deceived by it, or who was deceived by it but such deception did not proximately cause him injury – does not have standing under Article III and his case must be dismissed.

In apparent recognition that the requirements of Article III are fatal to his case, plaintiff argues that these requirements apply differently in class actions. (Oppos. 23-24). But it is black letter law that these requirements

are "no less true with respect to class actions than with respect to other suits." *Lewis v. Casey*, 518 U.S. 343, 357 (1995). *Accord, Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976). Ignoring these U.S. Supreme Court cases, plaintiff relies on two district court decisions. Neither has any bearing on the issues before this Court.

In one case, a securities action, the court held that where the named plaintiffs *were* "injured in fact" and that injury *was* "fairly traceable" to the defendant's misrepresentations, the plaintiffs did not lose standing "because some putative class members were injured by misrepresentations made after" the named plaintiffs had acquired their stock. *In re Verisign, Inc. Securities Litig.*, 2005 WL 88969, *5 (N.D. Cal. Jan. 13, 2005). In the other case, the court relied on *Verisign* in making the same holding. *In re Leapfrog Enter., Inc. Securities Litig.*, 2005 WL 3801587, *3 (N.D. Cal. Nov. 23, 2005). Neither case, nor the other cases plaintiff cites, remotely suggest that a class member who was *not* injured or whose injury was *not* caused by the defendant's misrepresentation could recover money either in an individual action or as a member of a class.[8]

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[8] The other cases plaintiff cites hold that where a case becomes moot as to the named plaintiff, under certain circumstances the plaintiff can continue in his capacity as a named plaintiff where there is still a live controversy for members of the class. *See U.S. Parole Comm. v. Geraghty*, 445 U.S. 388, 401–07 (1980); *Sosna v. Iowa*, 419 U.S. 393, 399-402 (1975); *LaDuke v. Nelson*, 762 F.2d 1318, 1324-25 (continued...)

In sum, Proposition 64 provides that to obtain "any relief" under Sections 17200 or 17500, the plaintiff must "ha[ve] [1] suffered injury in fact and [2] ha[ve] lost money or property [3] as a result of such unfair competition." Simply put, there is no basis in the language of the Proposition or in the case law for plaintiff's assertion that Proposition 64 is a strict liability statute.

II.

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

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

1. Individual Issues of Fact Regarding the Elements of Deception, Injury in Fact, Loss of Money or Property, Causation and Restitution Preclude Certification of a Class on Plaintiff's UCL Claims

It is telling that in the *one* page that plaintiff devotes to the issue of whether "substantial evidence" supports the Respondent Court's holding that common issues of fact regarding issues of liability under §§ 17200 and 17500 predominate over individual issues, he refers to *no* evidence. (*See*

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[8] (...continued)
(9th Cir. 1985). None of these cases even hints that the obverse would be true – that a named plaintiff who *has* standing can assert claims, and seek monetary relief, on behalf of class members who do *not* have standing (*e.g.*, on behalf of person who have *not* suffered injury in fact proximately caused by the defendant's wrongful conduct).

Oppos. 26). Thus, plaintiff makes no effort to explain *how* the issues of deception, injury in fact, loss of money or property and causation can be established *here* based on "common proof." *Baltimore Football Club, Inc. v. Super. Ct.*, 171 Cal.App.3d 352, 362-64 (1985); *Brown v. Regents*, 151 Cal.App.3d 982, 989 (1984). The reason for plaintiff's silence is that, as explained in detail in Pfizer's Petition (Pet. 38-44), individual issues of fact predominate given the undisputed facts, among others, that:

- some labels had *no* claim as to the comparative effectiveness of Listerine (*see* Pet. 22);
- some people did not even read the label or see any commercial before purchasing the product (*see, e.g., Whalen*, EXP 194);
- as for the three labels that did have such a comparative claim, each was different and some of the labels also told consumers "to ask your dentist," to "floss daily" and that Listerine is "not a replacement for floss" (EXP 856);
- there were four different television commercials containing different statements regarding the comparative effectiveness of Listerine, and three of the commercials expressly stated: "there's no replacement for floss" or "not a replacement for floss." (EXP 855-56, 867-71);

- given that most of the television commercials and some of the labels expressly told consumers that Listerine was not a replacement for floss or that they should continue to floss, many people were *not* deceived by the labels; thus, in a survey that the plaintiff submitted in the *McNeil* litigation, only 39% of those questioned about the first of the three Listerine labels stated that they "can use Listerine instead of floss," and when the results of the survey's "control cell" are factored in, the percentage who took away this replacement message – which is the alleged "false impression" plaintiff alleges in this case – was only 17% (*i.e.*, 39%–22%) (EXP 703, 712; *see* Oppos. 5);
- when asked directly in the survey, 70% of consumers (92% when the control is factored in) did *not* take a way a replacement message from the third commercial (EXP 688, 712);
- in a survey Pfizer submitted in the *McNeil* litigation, one half of the respondents were exposed to the second version of Big Bang, which was the version being broadcast at the time of the survey, and the other half were shown a Listerine commercial that was broadcast in 2003 and mentioned floss, but did not contain an "as effective" claim. The survey showed that, as a result of seeing the Big Bang commercial, consu-

mers were *not* more likely to purchase less floss, to use floss less frequently *and/or* to believe that Listerine provides all of the benefits of flossing. (EXP 281-397, 609-10).

Faced with these and the other record facts set forth in our Petition, it is not surprising that plaintiff does not dispute that the only way to determine whether any label or commercial misled a particular class member would be to inquire of *that* class member what message, if any, *he* took away from *that* label or *that* commercial. Nor does plaintiff dispute that individual inquiries would be required to determine proximate causation – to determine, for example, whether the class member changed his flossing behavior or purchases.[9] Indeed, as we noted in our Petition (Pet. 42-43) – which plaintiff ignores – plaintiff repeatedly conceded in his deposition that each of these and other issues would require an individual inquiry of each class member, that he could only testify as to his own experiences and not

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[9] A noted in Pfizer's Petition (Pet. 20), only 24% of U.S. households use floss, only 2.5% of households floss regularly, and 87% of consumers floss infrequently or not at all. Moreover, dentists' flossing recommendations were *stable* and consumers' floss consumption and use *increased* during the professional Listerine advertising campaign, and when the initial and second commercials were broadcast, sales of floss *increased*, and sales *increased* in October 2004 to higher than the October 2003 level. (*See* Pet. 23). Thus, there is simply no basis to assume that all (or even a majority) of those who saw the challenged commercials or labels were deceived and therefore stopped flossing. Only an individual inquiry would indicate which class members did so. In fact, many people continued to floss *and* use Listerine as the ads advised.

as to what other members may have seen, done or perceived, and that his attorney asserted it would be "speculation" for Mr. Galfano to do so.

Unable to contest the necessity of individual inquiries, plaintiff is left to his *ipse dixit* that all these facts are irrelevant. (Oppos. 26). But, as we previously showed, to succeed on his UCL claims on a class basis, plaintiff must demonstrate *with common proof* that each class member was deceived, suffered injury in fact and lost money or property as a result of the alleged falsity of the challenged advertising claims. Indeed, it is striking that plaintiff asserts that whether any ads "were seen by class members [is] immaterial" (Oppos. 26) where one of the "misuse[s]" the people of California did "find and declare" in enacting Proposition 64 was that lawsuits had been filed where the plaintiff had not "viewed the defendant's advertising." Prop. 64 §1(b)(3).

The bottom line is that an individual cannot obtain any relief under §17200 or §17500 if he was not misled by the ad and, even if he was misled, if the falsity of the ad did not proximately cause him injury in fact and cause him to lose money. And, of course, if the individual never saw or heard the claim, none of these elements is satisfied. None of these issues can be determined without an individual inquiry. That one consumer saw and was misled by one of the labels and was proximately injured does not

prove that another consumer saw or was misled by another label or commercial or was proximately injured thereby.

Finally, plaintiff contends that restitution can be resolved on a class-wide basis. (Oppos. 27-28). He does not dispute that the only restitution that could be awarded is restitutionary disgorgement, and that this requires that the plaintiff return the benefit he received, or, where, as here, he cannot do so, he is entitled only to the difference between what he paid and the fair market value of what he received. (*See* Pet. 43).[10] Nor does plaintiff contest that, with rare exception, the retail prices for *each* size and flavor of Listerine mouthrinse varied widely from week to week and from market to market during the relevant time period. (EXP 863-65). Plaintiff also does not dispute that the value of Listerine varies from class member to class member. (*See* Pet. 43-44).

Failing to contest any of this law or these facts, plaintiff relies instead on the decision in *Colgan*. At issue there were tools that were claimed to be "made in U.S.A." The Court reversed the lower court's award, holding that there was "no evidence . . . to support the amount of the restitution award." 135 Cal.App.4th at 695.

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[10] Citing *Feitelberg v. Credit Suisse First Boston LLC*, 134 Cal.App.4th 997, 1020 (2005); *California Fed. Bank v. Matreyek*, 8 Cal.App.4th 125, 134 (1992); RESTATEMENT (FIRST) OF RESTITUTION, §1 cmts. a, c (1937); RESTATEMENT (SECOND) OF RESTITUTION, §19, §19 cmt. c, §22 (Tentative Draft No. 1, 1983).

In particular, the Court noted that the trial court had rejected the plaintiffs' "evidence concerning the market value, or retail price of [defendant's] tools, and the market price of similar tools that were made in China." 135 Cal.App.4th at 700. The Court also noted that the plaintiffs submitted expert testimony that the "made in U.S.A." claims "have a significant positive impact on consumers and that [defendant] realized a 'substantial advantage' by using" the claim, but "did not attempt to quantify either the dollar value of the consumer impact or the advantage realized by [defendant]." The Court did not, as Mr. Galfano asserts, "*determine*[] that" the amount of restitution "*would include* an expert's quantification of 'either the dollar value of the consumer impact or the advantage realized by [the defendant].'" (Oppos. 28 (emphasis added), quoting out of context *Colgan*, 135 Cal.App.4th at 700).

All the Court of Appeal held in *Colgan* was that the record contained no evidence of the amount of restitution necessary to restore purchasers to the status quo ante. There is no holding in *Colgan* that such evidence can always be provided in a class action on a classwide basis by expert testimony. Put another way, the Court did not hold that where, as here, the challenged advertising was *not* facially false as to *each* product and *each* purchaser, and where retail prices of the products vary widely, a uniform amount of restitution could be determined for each class member by expert

testimony and without individual inquiries of the class members. Indeed, any such holding would fly in the face of the Court's reiteration of the clear law that "'the object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest" and that the UCL requires that restitution "must be of a measurable" and "specific" amount necessary "to restore to the plaintiff what has been acquired by violations of the statutes." *Id.* at 697-99. Here, indisputably, the answers to these questions can only be determined by individual inquires of the members of the putative class.

2. Plaintiff's Reliance on Decisions Addressing Potential Certification of Fraud Claims Confirms that the Respondent Court Abused Its Discretion in Certifying a Class on Plaintiff's UCL Claims

Plaintiff contends that class certification should be upheld because "[t]he California Supreme Court has long recognized that a class action may be brought for fraud in cases with circumstances similar to those of this case." (Oppos. 17). In support of this bald assertion, plaintiff cites two cases from over thirty years ago. *Vasquez v. Superior Ct.*, 4 Cal.3d 800, 808-09 (1971); *Occidental Land, Inc. v. Superior Ct.*, 18 Cal.3d 355 (1976). But, as the California Supreme Court subsequently explained in *Mirkin v. Wasserman*, 5 Cal.4th 1082 (1993) – a decision plaintiff pointedly fails to cite – only in rare instances is it appropriate to certify a fraud claim for class

treatment. The types of facts at issue here are precisely those that, *Mirkin* and other cases hold, are *not* appropriate for class certification.

After emphasizing that "California courts have always required plaintiffs in action for deceit to plead and prove the common law element of actual reliance," the Court in *Mirkin* explained that *Vasquez* and *Occidental* "do not support an argument for presuming reliance on the part of persons who never read or heard the alleged misrepresentation." 5 Cal.4th at 1092-94. The Court held that in *Vasquez* the plaintiffs "had adequately pled actual reliance . . . on an individual basis" and that "reliance, under the peculiar facts of the case, was truly a common issue." *Id.* at 1094.

In particular, the plaintiffs pled that the alleged misrepresentations "were in fact made to *each* class member . . . 'because the salesmen employed by [the defendant seller] memorized a *standard* statement containing the representations (which in turn were based on a printed narrative and sales manual) and that this statement was recited *by rote* to every member of the class.'" 5 Cal.4th at 1094 (quoting *Vasquez*, 4 Cal.3d at 811-12) (emphasis added). The Court in *Mirkin* then went on to say that the "facts of *Occidental* . . . are similar," *i.e.*, the "plaintiffs alleged that the defendant's misrepresentations had actually been made to *each* member of the class" because they "were contained in a public report and '[*e*]*ach* purchaser was obligated to read the report and state in writing that he had done

so.'" *Id.* at 1094-95 (quoting *Occidental*, 18 Cal.3d at 358) (emphasis added).

The Court then made clear the very limited nature of its prior rulings in *Vasquez* and *Occidental*:

> Plaintiffs, who rely heavily on *Vasquez* and *Occidental Land*, misinterpret those decisions. Plaintiffs argue that we "held that pleading and proof of direct reliance by each victim of a fraud are not required where material misrepresentations are alleged" and that, in the absence of actual reliance, reliance may be pled "by the equivalent of the fraud-on-the-market doctrine, i.e., material misrepresentations to the class, plus action consistent with reliance thereon." In fact, we held no such thing. What we did hold was that, *when the same material misrepresentations have actually been communicated to each member of a class*, an inference of reliance arises as to the entire class. (*Id.* at 1095) (emphasis by the Court).

Accord, *Kavruck v. Blue Cross of Calif.*, 108 Cal.App.4th 773, 786-87 (2003) (relying on *Mirkin*); *Osborne v. Subaru of Am., Inc.*, 198 Cal.App.3d 646, 660-61 (1988) (distinguishing *Vasquez* and *Occidental*).[11] These decisions are consistent with the numerous cases we cited (Pet. 42 n.9) – all of

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[11] All but one of the decisions on which plaintiff relies predate *Mirkin* and are distinguishable either because they involved identical misrepresentations that were in fact made to each class member or because, as do plaintiffs here, they misread *Occidental* or *Vasquez* inconsistently with *Mirkin*. *Nat'l Solar Equip. Owners' Ass'n v. Grumman Corp.*, 235 Cal.App.3d 1273, 1283-84 (1991); *Danzig v. Jack Gryndberg & Assocs.*, 87 Cal.App.3d 604, 613 (1978); *Metkowski v. Traid Corp.*, 28 Cal.App.3d 332, 338 (1972). The remaining decision was not a class action and the plaintiff, unlike here, in fact heard and relied on the misrepresentation. *Whiteley v. Philip Morris, Inc.*, 117 Cal.App.4th 635, 679-82 (2004).

which plaintiff ignores – denying class certification of fraud and negligent misrepresentation claims on the ground that individual issues of, *inter alia*, reliance predominate over any common issues.[12]

Having ignored *Mirkin* and misinterpreted *Vasquez* and *Occidental*, plaintiff argues that a class was properly certified on his UCL claims because "the representations made in written material disseminated by Defendants [were] received by . . . Plaintiff and all class members." (Oppos. 19). In fact, it is undisputed that the named plaintiff did *not* see any of the television commercials in question or two of the three labels, that the television commercials and labels contained *different* statements

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[12] *Accord, Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665 (9th Cir. 2004); *Lewallen v. Medtronic USA, Inc.*, 2002 WL 31300899, *4 (N.D. Cal. Aug. 28, 2002); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 438 F.3d 376, 385-86 (4th Cir. 2006); *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 549-50 (5th Cir. 2003); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 217-24 (5th Cir. 2003); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 434 (4th Cir. 2003); *Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 341-42 (4th Cir. 1998); *Andrews v. AT&T Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 369 (E.D. La. Feb. 27, 1997); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 361 (S.D. Ga. 1996); *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 240 n.3 (S.D. Ind. 1995); *Truckway, Inc. v. General Elec.*, 1992 WL 70575, **5, 7 (E.D. Pa. Mar. 30, 1992); *Sunbird Air Servs., Inc. v. Beech Aircraft Corp.*, 1992 WL 193661, *5 (D. Kan. July 15, 1992); *Freedman v. Arista Records, Inc.*, 137 F.R.D. 225, 229 (E.D. Pa. 1991); *Rosenstein v. CPC, Intl, Inc.*, 1991 WL 1783, *3 (E.D. Pa. Jan. 8. 1991).

and were *not* uniform, that many members of the class purchased bottles of Listerine during the time period at issue that had *none* of the challenged labels, and that even those who purchased bottles with one of the challenged labels did not necessarily read it or see a television commercial containing an "as effective" claim.[13] (*See* Pet. 21-2; *Whalen*, EXP 194). This, then, is hardly a case involving a uniform misrepresentation that was seen by each and every member of the class.

Accordingly, as explained above, whether the UCL provisions as amended by Proposition 64 are applied, or the law regarding fraud and negligent misrepresentation is applied somehow by analogy as plaintiff appears to argue it should be, a class was improperly certified. Only through individual inquiries can it be determined if a class member saw or read any of the challenged labels or ads, was misled by the label or ad into believing that

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[13] The citations on which plaintiff relies do not support his claim that all class members received the representations by Pfizer regarding Listerine. Thus, plaintiff cites to (a) a handful of paragraphs from his complaint (EXP 46-48, 50-51) that, apart from not being evidence, do *not* allege (nor could they allege consistent with the record facts) that a label with an "as effective" claim was "purchased by *each* class member," and (b) to an interrogatory answer by Pfizer (EXP 134-35) stating that there were four different labels with "as effective" claims and that only "certain" of the bottles had such labels, which is directly contrary to plaintiff's contention that everyone who purchased a bottle received the representation. (Oppos. 19, 34) (emphasis added).

Listerine was a substitute for floss, and that the alleged falsity of this claim proximately caused him injury in fact and lost money or property.

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

In its Petition, Pfizer demonstrated that individual issues as to each of the elements of an express warranty claim predominate over any common issues. (Pet. 44-51). In response, plaintiff makes no mention of the requirements that to succeed on a breach of express warranty claim the plaintiff must prove that "the breach . . . was the proximate cause of the loss sustained," and that he provided timely notice of any breach, OFFICIAL COMMENT 13, COMM. CODE §2314; COMM. CODE §2607 – let alone explain *how* such statutory requirements could be established in this case with classwide proof and without individual inquiries.

Plaintiff, however, does make three arguments addressing other issues. None of these arguments can withstand analysis or are belied by the undisputed facts.

1. Plaintiff argues that "reliance is presumed," but the very Official Comment plaintiff quotes expressly states that the issue of reliance "normally is one of fact." (Oppos. 29). By definition, an issue of fact means that it is an issue specific to each class member and, thus, requires individual inquiries.

2. Plaintiff argues, inconsistently (and contrary to the Respondent's Court view (EXP 010)), that "the reliance concept under Commercial Code §2313 has been abandoned." (Oppos. 29-30). (*Compare* Pet. 44 (citing cases); *Osborne*, 198 Cal.App.3d at 660-62 (affirming denial of class certification). Again, the very quote plaintiff relies on disproves his point. Plainly, whether the defendant's representation is "part of the basis of the bargain" or is "a factor or consideration *inducing* the buyer to enter into the bargain," *Keith v. Buchanan*, 173 Cal.App.3d 13, 23 (1985) (emphasis added), are issues in this case that are unique to each class member and require individual proof, thus mandating, as the Court held in *Elder*, denial of certification. (*Elder*, at 12).

Similarly, individual proof is necessary if, as *Keith* states, a warranty statement is only "presumptively part of the basis of the bargain" and the seller may submit proof "that the resulting bargain does not rest at all on the representation." 173 Cal.App.3d at 23. Thus, where, for example, the plaintiff never saw the challenged warranty, it could not have been a part of the "basis of the bargain." *See, e.g., Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 567 (3d Cir. 1990) ("a plaintiff effectuates the 'basis of the bargain' requirement of section 2-313 by proving that she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise"), *rev'd on other grounds*, 505 U.S. 504 (1992). Nor, to take another exam-

ple, could a statement be part of the bargain if the purchaser knew at the time that the statement was not accurate. *See, e.g., McDonnell Douglas Corp. v. Thiokol Corp.*, 124 F.3d 1173, 1178 (9th Cir. 1997) ("'An affirmation of fact which the buyer from [its] experience knows to be untrue cannot form a part of the basis of the bargain.'"). Each of these facts requires individual inquiries, and, if the issue is disputed, the dispute, consistent with due process, must be resolved at a trial at which Pfizer would have the right to cross-examine the class member and present evidence.

Here, the record evidence demonstrates that any presumption that the alleged warranty statement is part of the bargain has been completely rebutted. Thus, there are undoubtedly brand loyal purchasers of Listerine who bought the product before, during and after the "as effective" claim and without reference to it. (*See Whalen*, EXP 195). These members of the class clearly did not rely on the alleged warranty; it was not part of *their* bargain. Neither did those who purchased Listerine solely as a breath freshener. Similarly, the survey evidence from the *McNeil* litigation shows that only 39% of those questioned about the first of the three Listerine labels took away a message from the label that they "can use Listerine instead of floss," and when the results of the survey's "control cell" are factored in, the percentage who took away this alleged replacement message drops to only 17%. (EXP 703, 712). In the language of warranty law, only

those 39% (or 17%) were aware of the alleged substitution warranty and could have relied on it. Thus, any suggestion that the substitution warranty was part of the basis of the bargain for all class members has been overwhelmingly rebutted, leaving the issue as one of fact that must be determined with respect to each class member by making individual inquiry of them.[14]

Finally, we note that plaintiff does not even attempt to support the Respondent Court's reliance on *Anthony v. Gen. Motors Corp.*, 33 Cal.App.3d 699 (1973). This is understandable because, as we demonstrated (Pet. 46-47), the decision provides no support for the certification of an express warranty class here.

3. Plaintiff agrees that the measure of damages is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." (Oppos. 31) (quoting COMM. CODE §2714). Plaintiff then goes on to assert that "in this case, the measure of damages is the difference between (1) the value of the Listerine accepted by Plaintiff and each member of the class, and (2) the value of Listerine plus the price of floss." (*Id.*). Even assuming that this

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[14] Plaintiff's assertion (Oppos. 31) that the "as effective" claim was "affixed to the Listerine bottles purchased by each class member" is false and belied not just by the evidence, but by the very documents plaintiff cites. (*See* p. 33 & n.13, *supra*).

strange, improper and unsupported calculation – for which plaintiff cites only his complaint (which makes no reference to any such calculation) – had any merit, because it is undisputed (i) that the vast majority of class members will not have receipts (as plaintiff did not), (ii) that many will not recall which size or bottle (with or without a challenged label) they purchased (as plaintiff did not), and (iii) that the retail prices for Listerine vary widely in California, determining damages will be a fact-specific issue requiring individual inquiries that would overwhelm any common issues. (*See* Pet. 49-51).

Given these undisputed facts, it is not surprising that plaintiff makes no effort to explain *how* "the amount of damages due to each class member can be resolved on a class basis." (Oppos. 31). Nor does plaintiff make any effort to distinguish the cases we cited holding that class certification is inappropriate where, as here, individual issues of damages render a class action unmanageable. (*See* Pet. 50-51 & n.14). *See also, e.g., Thorn*, 438 F.3d at 392-93.

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It must be determined *at the time a class is certified how* these individual issues can be resolved manageably on a classwide basis. *Lockheed Martin Corp. v. Super. Ct.*, 29 Cal.4th 1096, 1106 (2003); *Washington*, 24 Cal.4th at 927. Having failed to make this determination – which it could

not because these issues manifestly cannot be resolved on a classwide basis – the Respondent Court abused its discretion and committed reversible error.

III.

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

Nowhere does plaintiff even attempt to explain how his claims are typical of those of other class members where he saw only one of the three labels at issue and where he did not even see any of the four television commercials. Nor does he address the holding in *Caro* that the plaintiff there was not typical of other class members because, among other reasons, he had not read the entire label and "would have had questions about the juice if he had read the whole label." 18 Cal.App.4th at 663. So too here. The three Listerine labels were *not* expressly false, but, rather, at most were implicitly false (which Pfizer denies). Moreover, several of the labels and commercials contained statements telling people to keep flossing and that Listerine was not a replacement for floss. As mentioned above (pp. 24-25, *supra*), the survey in the *McNeil* case survey shows that many people took away a literally true message and did not believe that Listerine could be substituted for floss. Mr. Galfano, thus, is not typical of purchasers who saw different labels or ads than he did and who took away different

messages and, unlike he, were not misled. Indeed, he admitted as much in testifying that his experience was *not* necessarily the same as that of other class members and that he could not testify as to what other members may have seen, done or perceived. (*See* Pet. 24-25). As plaintiff's attorney so aptly put it, it would be "speculation" for plaintiff to testify as to what other class members saw, did or perceived. (EXP 750-52, 765-67, 769-70, 779-80, 801-02). In short, if any conclusion can be drawn from this, it is that plaintiff's claim is *a*typical of those of the class.

Turning to the requirement that plaintiff adequately represent the absent class members, plaintiff argues that he is adequate merely because he showed up for his deposition and responded to discovery. (Oppos. 36). Plaintiff makes no effort to respond to Pfizer's argument, grounded in due process, that his interests conflict with those of class members who, unlike he, saw one of the challenged commercials or the second or third label. (*See* Pet. 54).

IV.

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

Plaintiff makes no effort to counter Pfizer's showing that because "the ability of each member of the class to recover clearly depends on a separate set of facts applicable only to him," and because plaintiff cannot

prove the "*measurable amounts*" to be restored to class members because of the absence of records of the prices class members paid and the varying value they received from their Listerine use, class treatment will not provide substantial benefits. (*See* Pet. 55) (quoting *Newell v. State Farm Gen. Ins. Co.*, 118 Cal.App.4th 1094, 1101 (2004); *Day*, 63 Cal.App.4th at 339 (Court's emphasis)).

Unable to dispute this showing, plaintiff makes six arguments to support his contention that class treatment will provide substantial benefits. None has any merit.

First, plaintiff argues "that it is desirable to consolidate, in a single action before a single court, all the claims against Defendant." (Oppos. 37). But it is undisputed that this is the *only* lawsuit involving Listerine in California, that only 17 California consumers contacted Pfizer regarding the "as effective" claim, and that only a few asked for (and then, of course, received) refunds. (EXP 896-97, 865). Nor does plaintiff contest that there is no need for an injunctive class because the challenged advertising has already been permanently enjoined. (*See* Pet. 13 n.6).

Second, plaintiff makes the preposterous argument that Pfizer, the largest pharmaceutical company in the world, "may be" judgment proof if individual suits were brought. (Oppos. 38).

Third, plaintiff argues that, because the amounts in dispute for each class member "are relatively small," it is "economically unfeasible to pursue remedies other than as a class action." (Oppos. 39). But it is precisely because individual inquiries are required to determine these small amounts that a class action will not provide substantial benefits. *See Day*, 63 Cal.App.4th at 339. Moreover, because a prevailing plaintiff may be awarded his attorneys' fees under C.C.P. 1021.5 – fees plaintiff expressly seeks here (EXP 48-49, 53-54, 56) – it is *not* economically unfeasible for a single plaintiff to sue on his individual claim.[15]

Fourth, in a single conclusory sentence, plaintiff argues that "the litigants will not encounter difficulties in managing this class action." (Oppos. 39). Plaintiff is left to this *ipse dixit* because neither he nor the Respondent Court has made any effort to explain *how* this case can be tried in a constitutionally permissible way given the large number of individual issues of liability, injury, causation, restitution and damages. This was a determination that the trial court was required to make *at the time it certified a class*. (*See* pp. 39-40, *supra*). Yet, here, even on appeal, plaintiff has not even attempted to explain how this case could be tried manageably, let

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15 *See, e.g., Thorn*, 438 F.3d at 393 (class action not superior because attorneys' fees could be recovered); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 375 (E.D. La. 1997) (same); *Strain v. Nutri/System, Inc.*, 1990 WL 209325, *8 (E.D. Pa. Dec. 12, 1990) (same).

alone present a "suitable and realistic plan for trial" specifying *how* the claims and defenses can be tried in a way that protects the defendant's due process rights. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001). As plaintiff himself argues, "'where the court finds . . . that there are serious problems *now appearing*, it should not certify the class merely on the assurance of counsel that some solution will be found." (Oppos. 42-43) (quoting *Reyes v. Board of Supervisors*, 196 Cal.App.3d 1263, 1275 (1987) (Court's emphasis)). Indeed, the decision plaintiff quotes relied on an *en banc* Fourth Circuit decision holding that certification was *not* appropriate because of the need for "individual proof" of "the individual claims and of the essential elements of individual injury and damage[s]." *Windham v. American Brands, Inc.*, 565 F.2d 59, 70-72 (4th Cir. 1977) (*en banc*). That is exactly the case here.

Fifth, plaintiff argues that the public will benefit because "separate lawsuits by each member of the class would increase the burdens" on the courts. (Oppos. 40). But, as noted earlier, the only lawsuit is plaintiff's. The only burden on the courts is the one imposed by this unmanageable lawsuit.

Sixth, plaintiff argues that *Pfizer* would be substantially prejudiced by denial of class certification because it would create a risk of "incompatible standards of conduct" on Pfizer and would result in higher legal fees to

Pfizer. (Oppos. 40). But since the issue of injunctive relief is moot, there cannot be any standards – incompatible or not – imposed on Pfizer. The only issue is whether an individual plaintiff is entitled to a *de minimis* monetary award.

At bottom, plaintiff's argument is that it would be easier for plaintiff if he did not have to prove, as required by the law, deception, injury, causation, damages and a restitutionary award on an individual basis, and could simply assume that the facts as to him are the same as the facts as to everyone else in the class. Such an all or nothing single trial, at which Pfizer would be denied the right to cross-examine and present evidence in connection with particular purchases by particular class members, would violate Pfizer's due process rights, as well as the rights of other members of the class who would be stuck with the facts as to Mr. Galfano's claim even if the facts as to their claims were more favorable. If due process means anything, it is that "[t]he benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). As the Supreme Court has explained:

> Procedural due process is not intended to promote efficiency . . . it is intended to protect the particular interests of the person whose possessions are about to be taken . . . . "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and

> efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)). *See also In re General Motors Corp. Engine Interchange Litig*, 594 F.2d 1106, 1133 (7th Cir. 1979) ("convenience and expediency cannot justify disregard of the individual rights of even a fraction of the class").

V.

THE RESPONDENT COURT ABUSED ITS DISCRETION IN FINDING THAT THE CLASS WAS ASCERTAINABLE

Plaintiff does not dispute that a class is ascertainable only if it is administratively feasible to determine if a given individual is a class member. (*See* Pet. 56; *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 706 (1967)). As one of the cases he cites states, although "a plaintiff is not required at [the class certification] stage to establish the . . . identity of class members," in order to demonstrate that a class is "ascertainable," the plaintiff must prove that "there exist sufficient *means* for identifying class members." *Reyes*, 196 Cal.App.3d at 1274-75 (emphasis by the Court).

Unable to contest this black letter law, plaintiff contends that "most cases suggest that the absence of . . . records is not determinative" of whether a class is ascertainable. (Oppos. 41). In fact, one of the cases plaintiff cites for this proposition held that a class was ascertainable

because the defendant "*does* have the records" to identify class members, *Reyes*, 196 Cal.App.3d at 1275 (emphasis added), and the other case simply held that the destruction of documents "*may* make it impossible to identify a significant portion of the certified class" and that this destruction *by defendant* "should not *in itself automatically* defeat the maintenance of a class action." *Employment Develop. Dep't v. Superior Ct.*, 30 Cal.3d 256, 266 (1981) (emphasis added).

Nor does plaintiff even attempt to answer the fundamental question of *how* class members can be identified where it is undisputed that Pfizer has no records or means by which to identify them, that class members will not have such records, and that large numbers of retailers, including Wal-Mart, have no records of Listerine purchases. (*See* Pet. 57-58, Oppos. 43).[16] Given these undisputed facts, plaintiff contends that publication notice can

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[16] It cannot be determined from the records of the few retailers who have purchase records (usually just for some customers) which of the three challenged labels was on the bottle in a particular purchase because the same UPC number can identify a bottle having no "as effective" label, as well as bottles having the first, second or third label variation. (EXP 860). Nor do the store records reveal which class members saw a challenged television commercial (and, if so, which of the four commercials). Accordingly, and given that the class is defined to include all purchasers, regardless of whether they saw any of the challenged labels or commercials, the store records are no substitute for individual inquiries to determine which class member saw a particular label or commercial and, if so, whether such class member was deceived and was proximately injured thereby.

be given to the class. (Oppos. 43-44). But as Pfizer previously explained (Pet. 57), and plaintiff makes no effort to contest, notice is not a means for identifying class members because it can be both over and under inclusive; people who did not purchase Listerine may read the notice, and people who did purchase Listerine may not read the notice. After notice is given, there will still have to be an individual proceeding for *each* consumer to determine whether or not that person, in fact, purchased Listerine during the relevant time period and, thus, is a class member.

CONCLUSION

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

Dated: March 29, 2006

Respectfully submitted,

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CERTIFICATION

I, Jeffrey S. Gordon, an attorney at law duly admitted to practice before all the courts of the State of California and am a member of the law firm of Kaye Scholer LLP, attorneys of record herein for petitioner and defendant Pfizer Inc., hereby certify that this document (including the headings, footnotes and quotations, but excluding the tables of contents and authorities, and this certification) complies with the limitations of Rule of Court 14(c)(1) in that it is set in a proportionally spaced 13-point typeface and contains 11,586 words as calculated using the word count function of WordPerfect.

By: _____
Jeffrey S. Gordon

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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

On March 29, 2006, I served the foregoing document described as:

PETITIONER'S RESPONSE

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

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

Executed on March 29, 2006, at Los Angeles, California.

Toyia Ellis
Name

Signature

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