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Supreme Court of the State of California
California Supreme Court
350 McAllister Street
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Re: Request for Depublication of *Pfizer Inc. v. Superior Court (Galfano)*, 141 Cal.App.4th 290, Sup. Ct. No. S145775, Ct. of App. No. B188106

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

Petitioner-defendant Pfizer Inc. ("Pfizer") respectfully submits this letter in opposition to the requests of six law firms that routinely represent plaintiffs in consumer fraud class actions – The Furth Firm LLP (filed Sept. 8) ("Furth Request"), Lerach Coughlin Stoia Geller Rudman Robbins LLP (filed Sept. 8) ("Lerach Request"), Barry L. Kramer (filed Sept. 11) ("Kramer Request"), Baum Hedlund (filed Sept. Sept. 11) ("Baum Request"), Strange & Carpenter (filed Sept. 11) ("Strange Request"), and Gutride Safier LLP (filed Sept. 15) ("Gutride Request") – to depublish the opinion entitled *Pfizer Inc. v. Superior Court (Galfano)*, 141 Cal.App.4th 290 (filed July 11, 2006; Second Appellate District, Division Three) ("*Galfano*"). We note that the Baum and Strange Requests are identical (except for one additional footnote in the Strange Request) and are written on behalf of law firms having offices in the same building.

The Requests, for the most part, merely repeat the arguments made by Respondent-plaintiff Steve Galfano in his depublication request ("Galfano Request," filed August 23). As Pfizer demonstrated in its response to Galfano's request ("Pfizer Response," filed Sept. 5), the Court of Appeal's unanimous ruling in *Galfano* was mandated by the plain language of Proposition 64 and by well established case law and is consistent with this Court's rulings in *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006), and *Branick v. Downey Savings & Loan Ass'n*, 39 Cal.4th 235 (2006). Indeed, if, as the Furth, Lerach, Baum and Strange Requests assert, the decision is inconsistent with and implicitly overruled by *Mervyn's*, it is at best odd that Galfano did not move for rehearing in the Court of Appeal after this Court decided *Mervyn's*.

Moreover, when all of their rhetoric is stripped away, it is telling that, just like the Respondent Court and Galfano, *nowhere* do the Furth, Lerach, Kramer, Baum, Strange and Gutride Requests ever state what the phrase "as a result of" in Proposition 64 *does* mean if it

does not mean causation and/or reliance. Nor do they purport to explain how a consumer who does not have standing to assert an individual claim under the UCL – because, as required by the express language of §17204 of the UCL (as amended by Prop. 64 §3), he has not "suffered injury in fact and has lost money or property as a result of such unfair competition" – can nevertheless recover as part of a class. (*See* Pfizer Response pp. 2-3).

Importantly, we further note that after the decision in *Galfano*, the Court of Appeal, Fourth Appellate District, affirmed decertification of a class asserting false advertising claims under Business and Professions Code § 17200, *et seq.*, and the Consumer Legal Remedies Act, Civ. Code, § 1750, *et seq.*, in a published decision that is consistent with *Galfano*. *In re Tobacco II Cases*, JCCP No. 4042 (Ct. App. 4th App. Dist., Div. 1, filed Sept. 5, 2006) (attached to Letter, Gordon to Supreme Court of California, filed Sept. 7, and reported at 2006 Cal. App. LEXIS 1353). In particular, in *Tobacco II* the Court held, *inter alia*, that Proposition 64's standing requirements apply to *all* members of the putative class, and that "[i]ndividual determinations would have to be made as to . . . whether [class members'] decision to smoke was a result of defendants' misrepresentations (and thus they suffered an injury due to defendants' conduct) or was for other reasons." (Slip Op. pp. 7-8, 17, 2006 Cal. App. LEXIS 1353, *9-10, 24-25). Even though this decision predated each of the Requests for depublication at issue here, only the (identical) Baum and Strange Requests even acknowledge it. (Baum Request 5 n.2, Strange Request 5 n.3). Relegating their discussion to a footnote, Baum and Strange concede that the Court in *Tobacco II* came to "a similar conclusion as the *Pfizer* Court." (*Id.*). Accordingly, depublication of the *Pifzer* opinion will not accomplish the asserted goals of the six law firms that represent plaintiffs, which is to eliminate a precedent governing all trial courts that they believe is incorrect. Moreover, the only two appellate panels to have reviewed the issue have come to consistent, unanimous decisions, each contrary to that advanced by the proponents of depublication.

Given the extent of the overlap between the Furth, Lerach, Kramer, Baum, Strange and Gutride Requests and the Galfano Request, we will limit our remaining response to the hodgepodge of new contentions that they assert. None of these contentions – which are legally unsupportable – provides any basis for depublication.

1. The Furth Request contends that Proposition 64's use of such words as "prosecuted" and "claimant" means that the Proposition is limited to the named plaintiff and does not apply to absent class members. (Furth Request p.5). But as this Court stated in *Mervyn's* when faced with the defendant's reliance on the Proposition's use of "prosecute," the word is "not . . . sufficiently clear" on which to base an interpretation of the Proposition. 39 Cal.4th at 229. This is particularly so as to the issues here given, *inter alia*, (a) the Proposition's plain language (*see* Pfizer Response pp. 2-3) and this Court's statement in *Mervyn's* that the Proposition "*withdraws the standing* of persons who have not been harmed *to represent those who have*," *id.* at 232 (emphasis added); (b) the clear law that "'*[e]ach* class member must have standing to bring suit in his own right,'" *Collins v. Safeway Stores, Inc.*, 187 Cal.App.3d 62, 73 (1986) (emphasis added); and (c) that "'[t]here can be no cognizable class unless it is first determined that members who make up the class have sustained the same or similar damage.'" *Caro v. Procter &*

Gamble Co., 18 Cal.App.4th 644, 663-64 (1993). In all events, a consumer who seeks relief as a class member is clearly a "claimant" (§17203), which just underscores that Proposition 64 applies to class members as well as to the named plaintiff.

2. The Baum, Strange and Lerach Requests contend that the Court of Appeal's decision in *Galfano* "makes claims for 17200 and 17500 indistinguishable from claims for common law fraud." (Baum Request p.2, Strange Request p.2, Lerach Request p.10). They are mistaken. Unlike in a common law fraud action, the UCL imposes "strict liability," *i.e.*, it does not require a showing that the defendant intended to injure or deceive the plaintiff. *See, e.g., South Bay Chevrolet v. Gen'l Motors Acceptance Corp.*, 72 Cal.App.4th 861, 877 (1999); *Mirkin v. Wasserman*, 5 Cal.4th 1082, 1091 (1993); *Leegin Creative Leather Prods., Inc. v. Diaz*, 131 Cal.App.4th 1517, 1524 (2005).

3. The Lerach and Kramer Requests assert that in *Galfano* the Court of Appeal held that to be "typical," there must be an "absolute identity" or "100% identity" between the plaintiff's claim and the "claims" of the class. (Lerach Request p.3, Kramer Request p.2). The Court of Appeal said nothing of the kind. All it stated was that, consistent with Proposition 64's express language, each class member must have "suffered injury in fact and lost money or property as a result of the violation." 141 Cal.App.4th at 303. In short, that each class member must, as required by Proposition 64, have been "injur[ed] in fact," does not mean that the injury of the plaintiff and each class member has to be "identical."

4. The Lerach Request asserts that standing under Article III of the U.S. Constitution "expresses itself in probabilities, not absolutes" (Lerach Request pp. 5-6), quoting the Supreme Court's statement that "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006), quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). Lerach is mistaken. The Court's statement Lerach quotes says that the plaintiff must allege injury *"and,"* as a *separate* requirement, that the *injury is likely to be redressed* by the requested relief. It does not state, as Lerach asserts, that "likelihood" of injury is sufficient. This is made abundantly clear by the Court: "The injury alleged must be, for example, 'distinct and palpable," and not 'abstract' or 'conjectural' or 'hypothetical.'" *Allen*, 468 U.S. at 751 (citations omitted). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (the "three elements" of the "irreducible constitutional minimum of standing" include "injury in fact" and "a causal connection between the injury and the conduct complained of").

5. The Lerach Request cites *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496 (2003), for the proposition that likelihood of deception is sufficient to establish a violation under the UCL. (Lerach Request p.6). As we explained, this is still the law. (*See* Pfizer Response pp. 6-7). Likelihood of deception is sufficient to establish a violation of the UCL, but for a person to have standing to sue for relief for that violation, he must, in the words of Proposition 64, "have suffered injury in fact and lost money or property as a result of" the violation. Indeed, Justice Klein, who authored both *Lavie* and *Galfano*, makes this point explicit in both cases. Thus,

Lavie states that "whether the conduct or advertisement *violates* the UCL is whether it is 'likely to deceive the consumer,'" 105 Cal.App.4th at 508 (emphasis added), and the *Galfano* decision states that "the mere likelihood of harm to members of the public is no longer sufficient for *standing* to sue." 141 Cal.App.4th at 304 (emphasis added). Accordingly, Lerach is mistaken in contending that the *Galfano* decision creates "two *liability* frameworks" – one for private parties and one for the Attorney General. (Lerach Request p.9) (emphasis added). What it does do is set up two *standing* frameworks – one for private parties, who must show that they "have suffered injury in fact and lost money or property as a result of" the UCL, and one for the Attorney General, who does not have to make this showing.

6. The Lerach Request asserts that the Court of Appeal "overlooked" that likelihood of deception is the standard for liability under the Lanham and FTC Acts. (Lerach Request pp. 6-7). Just as is the case with the UCL (*see* Pfizer Response pp. 6-7), the standard for a violation of the Lanham and FTC Acts is not the same as the standard for standing to obtain monetary relief. Thus, contrary to Lerach's assertion, although likelihood of deception is sufficient for injunctive relief, actual deception is required to recover damages under the Lanham Act. *Burndy Corp. v. Teledyne Indus., Inc.*, 748 F.2d 767, 772 (2d Cir. 1984); *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). A competitor who succeeds on a false advertising or trademark infringement claim is not entitled to a monetary recovery based on a showing that an advertisement is likely to deceive. Rather, a competitor is limited to that amount actually traceable to sales that the plaintiff lost to persons who were actually deceived. *See, e.g., Plasticolor*, 713 F. Supp. at 1349-50; *Burndy*, 748 F.2d at 771 ("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"). Similarly, under the FTC Act, as the very case the Lerach Request cites states, "[w]hile proof of consumer reliance is unnecessary to establish a § 5 violation, . . . such proof *is* necessary to establish the right to consumer redress." *FTC v. Freecom Communs., Inc.*, 401 F.3d 1192, 1203, 1205 (10th Cir. 2005) (emphasis added).

7. The Lerach Request asserts that *Galfano*'s holding that reliance must be shown to obtain relief "sows unnecessary tension with the [UCL's] remedial scheme." (Lerach Request p.7). To the contrary, as we showed in our response to Galfano's Request for depublication (Pfizer Response p.7), and as the Furth Request all but concedes (Furth Request p.5 n.3), the *Galfano* decision is fully consistent with the UCL's remedial scheme as explained by this Court in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003), and *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal.4th 116 (2000). Thus, in *Korea* this Court stated that "restitution is limited to restoring money or property to *direct victims* of an unfair practice" – a "restitutionary form of disgorgement" – and that "*non*restitutionary disgorgement" is not a permissible UCL remedy. *Korea,* 29 Cal.4th at 1148, 1150-51 (emphasis added). *Accord, Kraus*, 23 Cal.4th at 138. "With restitutionary disgorgement, the focus is on the plaintiff's loss." *Feitelberg v. Credit Suisse First Boston LLC*, 134 Cal.App.4th 997, 1013 (2005). Accordingly, "the amount of restitution" that may be awarded is that amount "necessary to make *injured* consumers whole" and "must be of a measurable amount to restore to the plaintiff what has been acquired by vio-

lations of the statutes, and that measurable amount must be supported by evidence." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 697-98 (2006) (emphasis added).

Thus, where an ad is likely to deceive the public, but a particular plaintiff did not rely on the ad, was *not* deceived and suffered *no* injury, there is no amount of restitution "necessary to restore [him] to the status quo ante." *Colgan*, 135 Cal.App.4th at 700. He was not a "victim" (direct or otherwise) "of an unfair practice," he was not "injured," he suffered no "loss," and there is no "money . . . taken [from him]" or that he "had an ownership interest in" in any amount (measurable or otherwise) that is "necessary to restore [him] to the status quo ante." *Id.*; *Korea*, 29 Cal.4th at 1152; *Madrid v. Perot Sys. Corp.*, 130 Cal.App.4th 440, 455 (2005); *Feitelberg*, 134 Cal.App.4th at 1012-13. Remarkably, although it relies on the distinguishable decision in *Fletcher v. Security Pacific Nat'l Bank*, 23 Cal.3d 442 (1979) (*see* Pfizer Request p.7 n.4), the Lerach Request fails even to address this Court's later holdings in *Korea* and *Kraus*.

8. The Baum, Strange and Gutride Requests place much emphasis on the federal district court decision in *Anunziato v. eMachines, Inc.*, 402 F. Supp.2d 1133 (C.D. Cal. 2005), which held that causation or reliance was not required under Proposition 64, but ignore *Laster v. T-Mobile USA, Inc.*, 407 F. Supp.2d 1181, 1194 (S.D. Cal. 2005), which held that "[t]he language of the UCL, as amended by Proposition 64, makes clear that a showing of causation is required." (Baum Request pp. 2-5, Strange Request pp. 3-5, Gutride Request p.1). Without any analysis of Proposition 64's language, the court in *Anunziato* rejected the express causation requirement of Proposition 64 in favor of what it believed to be the better public policy. 402 F. Supp.2d at 1137. 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. *Id.* at 1137-38. 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. Moreover, as we showed in Pfizer's Response to Galfano's depublication request (Pfizer Response p.4), courts have interpreted the identical "as a result of" language in the CLRA as requiring evidence of causation, which the *Anunziato* court ignored. In addition, as the *Galfano* Court correctly recognized, the court in *Anunziato* improperly "substituted its judgment for that of the voters." 141 Cal.App.4th at 306.

9. The Baum, Strange and Gutride Requests assert that the *Galfano* opinion should be depublished because it allegedly imposes a reliance requirement in all UCL actions, including those based on "unlawful" practices. (Baum Request pp. 5-6, Strange Request pp. 5-6, Gutride Request p.2). As evidenced by the fact that these three requests fail to cite to the *Galfano* opinion, the Court of Appeal made no such holding. *Galfano* involved alleged false advertising, and not the UCL's "unlawful" prong. Accordingly, the Court of Appeal had no occasion to, and did not, address the application of Proposition 64's standing requirements to actions brought under that prong. It should go without saying that there is no basis to depublish an opinion based on a holding or ruling that the published opinion did not make.

Finally, in their Requests, the six law firms who represent plaintiffs broadly claim that if *Galfano* is not depublished, that will be the death knell of consumer class actions. The Court of Appeal in *Galfano,* however, did not consider whether and under what circumstances reliance might be proven on a class-wide basis, and certainly contains no holding that no future consumer fraud class actions can be certified as class actions because issues of reliance, causation and injury will always predominate.

The bottom line is that the Court of Appeal's well-reasoned decision, which follows the plain language of Proposition 64, is fully in accord with the case law, and contains helpful analysis that may provide guidance to practitioners and the courts. Accordingly, the Court of Appeal's unanimous decision to publish *Galfano* – which is consistent with and came to the same conclusion as the only other Court of Appeal decision to address Proposition 64's standing requirements (*Tobacco II*) – was eminently correct under Rule 976 and the Furth, Lerach, Kramer, Baum, Strange and Gutride Requests to depublish it should be denied.

Respectfully submitted,

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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 1999 Avenue of the Stars, Suite 1600, Los Angeles, California 90067.

On September 18, 2006, I served the following document described as **LETTER RE REQUEST FOR DEPUBLICATION** by placing a true copy of the above entitled document in a sealed envelope addressed as follows:

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