No. S147345

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE TOBACCO II CASES, JCCP 4042

WILLIAM BROWN, DAMIEN BIERLY, and MICHELLE BULLER-SEYMORE, on behalf of themselves and all those similarly situated,

Plaintiffs-Appellants,

vs.

PHILIP MORRIS USA INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION (individually and as successor by merger to THE AMERICAN TOBACCO COMPANY); LORILLARD TOBACCO COMPANY; LIGGETT GROUP INC.; LIGGETT & MYERS, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.; and THE TOBACCO INSTITUTE,

Defendants-Respondents.

Review of a Decision by the Court of Appeal, Fourth Appellate District, Division One
Affirming an Order Decertifying a Class Action, San Diego County Superior Court,
Case No. 711400 Judicial Council Coordination Proceeding 4042
The Hon. Ronald Prager, Judge Presiding

Unfair Competition Case, Service on District Attorney and Attorney General required by Business and Professions Code Section 17209

APPLICATION TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-RESPONDENTS AND BRIEF *AMICUS CURIAE* OF PFIZER INC.

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APPLICATION TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-RESPONDENTS AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to California Court Rule 8.200(c), *amicus curiae* Pfizer Inc. ("Pfizer") respectfully requests leave to file the accompanying brief in support of defendants-respondents that the decision below be affirmed. This application is timely made within 30 days after the filing of the reply brief on the merits. The issues on this are of great importance to Pfizer for two reasons.

First, Pfizer, a pharmaceutical company, is a major advertiser, spending tens of millions of dollars every year for television, print and other forms of advertising, including in California. The interpretation and application of California's Unfair Competition Law ("UCL") to advertising, including, in particular, the interpretation and application of Proposition 64, will have great short-term and long-term effect on Pfizer and its advertising. Accordingly, Pfizer has a significant interest in seeing that the UCL and Proposition 64, as well as the rules governing class certification, are correctly interpreted.

Second, Pfizer is a defendant in a pending putative class action in Superior Court, Los Angeles County, that raises virtually all of the issues that are before this Court on the instant review. Indeed, this Court has deferred ruling on its grant of review of the Court of Appeal decision in

Pfizer's favor reversing the trial court's class ruling against Pfizer, pending resolution of the instant review. *Pfizer Inc. v. Superior Ct. of Los Angeles Cnty. (Galfano)*, 141 Cal.App. 4th 290, 303, 307 n.9, 308; [45 Cal. Rptr. 3d 840] (2006) ("*Galfano*"), *review granted and deferred, Pfizer, Inc. v. S.C. (Galfano)*, 146 P.3d 1250; [51 Cal. Rptr. 3d 707] (Cal. Nov. 1, 2006).[1] While the legal issues are the same, the differences in the factual context of the Pfizer advertising at issue, which Pfizer describes briefly below, will, we believe, help illuminate for this Court the varying contours and nuances of the legal issues to be resolved on the instant review.

At issue in the suit against Pfizer is Pfizer's advertising based on two randomized, controlled, observer-blind, 6-month clinical trials conducted according to the Guidelines of the American Dental Association ("ADA"), which were published in leading peer-reviewed journals. Both showed that twice-daily rinsing with Listerine is "at least as good as daily flossing in controlling interproximal gingivitis when both are used unsupervised over a 6-month period," and that Listerine is "significantly more effective than flossing" in reducing interproximal plaque over a 6-month period.[2]

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1 We recognize that this Court's grant of review of *Galfano* automatically depublished the Court of Appeal's decision. We refer to the decision not as authority or precedent, but to show Pfizer's interest, as *amicus curiae*, in the instant review.

2 *See* Sharma, *et al.*, *Comparative effectiveness of an essential oil*

(continued...)

Pfizer thereafter obtained ADA approval to advertise the claim that Listerine is "as effective as floss against plaque and gingivitis between teeth" to consumers, and ran four different versions of a television commercial between June 14, 2004 and January 8, 2005 containing the claim. The commercials did not expressly state that Listerine should be substituted for floss, stating instead to "floss daily," "ask your dentist," "ask your dental professional," "of course you should floss," "not a replacement for floss," or "there's no replacement for flossing." Indeed, the complaint alleges that the ads *implied* that Listerine could be substituted for floss. None of the commercials ran simultaneously or continuously.

In June 2004, Pfizer began to affix bottle labels stating: Listerine is "Clinically Proven" to be "As Effective As Floss Against Plaque and Gingivitis Between Teeth." Out of 34 different Listerine flavors and sizes, 19 *never* included *any* label that made any floss comparison, and even for the 15 having such labels, not every bottle was shipped with an "as effective" label. In addition, the "as effective" labels were revised twice over a 6-

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[2] (...continued)
mouthrinse and dental floss in controlling interproximal gingivitis and plaque, Am. J. Dentistry, Vol. 15, No. 6, December 2002, 351-55; Bauroth, *et al.*, *The efficacy of an essential oil antiseptic mouthrinse vs. dental floss in controlling interproximal gingivitis*, J. Am. Dental Ass'n, Vol. 134, No. 3, March 2003, 359-65.

month period, adding the statements "ask your dentist," "floss daily," and "not a replacement for floss."

The trial court certified a class of "all persons who purchased Listerine, in California, from June 2004 through January 7, 2005" based on its view that Proposition 64's standing requirements apply only to the named plaintiff and not to absent class members and, on that basis, finding that common issues predominated. The Court of Appeal, Second Appellate District, unanimously reversed. In issuing a writ of mandate directing the trial court to vacate its class certification order and "to enter a new and different order denying the motion," the Court of Appeal held that UCL §17204 and §17535 expressly "prohibit[] any person, other than the Attorney General or local public prosecutors from bringing a lawsuit under the UCL . . . unless the person has suffered injury and lost money or property as a result of such violations." *Pfizer Inc. v. Superior Ct. of Los Angeles Cnty. (Galfano), supra*, 141 Cal.App. 4th 290, 303, 307 n.9, 308; *review granted and deferred, Pfizer, Inc. v. S.C.* (Galfano), *146 P.3d 1250 (Cal. Nov. 1, 2006).*

The Court of Appeal further held that the Proposition's amendment of §17204 and §17535 expressly "requires private representative actions to meet the requirements of class action lawsuits." 141 Cal.App. 4th at 300. Then, relying on the "basic principle that '[e]ach class member must have

standing to bring the suit in his own right,'" and that "a class action is 'merely a procedural device for consolidating matters properly before the court,'" the Court held that, in Proposition 64's words, each class member, as well as the named plaintiffs, "must have suffered injury in fact and lost money or property as a result of the unfair competition or false advertising." *Id.* at 302, quoting *Collins v. Safeway Stores, Inc.*, 187 Cal.App.3d 62, 73 (1986), *Vernon v. Drexel Burnham Co.*, 52 Cal.App.3d 706, 716 (1975). In addition, the Court also held, relying on the express language of Proposition 64's standing requirements, that "the mere likelihood of harm to members of the public is no longer sufficient for standing to sue." *Galfano*, 141 Cal.App.4th at 296, 303.

Finally, the Court of Appeal held that Proposition 64's express "requirement that a plaintiff [have] suffered 'injury in fact . . . *as a result of*' the fraudulent business practice or false advertising" required that "a plaintiff actually *relied* on the misrepresentation and as a result, was injured thereby." 141 Cal.App.4th at 305 (Court's emphasis). The Court explained that "[a] consumer who was unaware of, or who did not rely upon, Pfizer's claims comparing Listerine to floss did not suffer any 'injury in fact' as a result of the alleged fraudulent business practice or false advertising." *Id.* at 305-06.

In other words, there can be no dispute that the legal issues that the Court of Appeal decided in *Galfano* are before this Court in the instant review. Not surprisingly, on November 1, 2006, the same day on which this Court granted review in this case, it granted plaintiff's petition for review in *Galfano*. 51 Cal.Rptr.3d 707 (Cal. Nov. 1, 2006). The Court also "deferred [action in *Galfano*] pending consideration and disposition of a related issue in *In re Tobacco II cases*," thus recognizing Pfizer's direct interest in the outcome of the instant review. *Id.*

For these reasons, we respectfully urge this Court to grant Pfizer's application for leave to file the accompanying *amicus curiae* brief.

Dated: March 26, 2007

Respectfully submitted,

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The central issue raised in this review is whether the Court of Appeal correctly held that Proposition 64's standing requirements apply both to the named plaintiff and all class members and not, as petitioners argue, only to the named plaintiff. The ruling below is mandated by the Proposition's express language that *all* "[a]ctions for *any* relief" under Sections 17200 and 17500 of the Business & Professions Code (collectively, the "UCL") "shall be prosecuted . . . by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition," and that a plaintiff "may pursue representative claims or relief on behalf of others *only* if" he "meets the[se] standing requirements . . . *and* complies with" Cal. Civ. P. Code §382's class certification requirements. (Prop. 64 §§ 2, 3, amending Cal. Bus. & Prof. Code § 17204) (emphasis added). Thus, under Proposition 64's plain and unambiguous language, an individual cannot bring an individual action without meeting this standing requirement.

It is a basic principle that "'*[e]ach* class member must have standing to bring the suit in his own right.'" *Collins v. Safeway Stores, Inc.*, 187 Cal.App.3d 62, 73 (1986) (emphasis added). That is because a class action "is merely a procedural device for consolidating" "individual" "actions" of "many individuals" that otherwise would have to be "individually litiga-

te[d]."[3] It is, thus, clear that after Proposition 64 an individual who has not suffered injury in fact and lost money or property as a result of alleged unfair competition lacks standing to bring an individual claim. That person does not gain standing where he otherwise has none by virtue of the procedural device of a class action. The Court of Appeal was clearly correct in rejecting petitioners' argument that Proposition 64 *bars* individual plaintiffs from suing where they have not suffered injury in fact and lost money or property as a result of the alleged unfair competition, but *permits* recovery for *the very same uninjured persons* if they are members of a class.

Equally clear is that the other principal issue the review raises – the meaning of Proposition 64's standing requirement that plaintiff "has suffered injury in fact and has lost money or property *as a result of*" the alleged UCL violation – was correctly decided below. The Proposition's plain language compels the conclusion that mere likelihood of harm is not sufficient for standing. That is because it cannot be concluded from the fact that an ad has the *capacity* to deceive that an individual plaintiff or class member *in fact* was deceived and suffered injury *as a result*. Far from conflicting with established law, the Court's decision is fully consistent with case

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3 *Vernon v. Drexel Burnham & Co.*, 52 Cal.App.3d 706, 716 (1975); *Washington Mutual Bank v. Super. Ct.*, 24 Cal.4th 906, 913 (2001); *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).

law interpreting the Consumer Legal Remedies Act ("CLRA")'s identical "as a result of language" – that only a consumer "who suffers any damage[s] *as a result of* the use of a [prohibited] method, act or practice" "may bring an action." CAL. CIV. CODE § 1780. Thus, the CLRA, which has the same likelihood-of-deception standard as the UCL, *Nagel v. Twin Labs., Inc.* 109 Cal.App.4th 39, 54 (2003), nonetheless requires, because of its "as a result of" provision, that a private plaintiff make a separate showing of "causation" as "a necessary element of proof." *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal.App.4th 746, 753-54 (2003).

The Court of Appeal also correctly held, in the context of affirming decertification of the class, that consumers who were not "exposed to," "affected" by, or did not "believe," or not "suffer[] any injury" "due to," defendants' alleged misrepresentations, had no UCL claim. (Slip Opinion ("Op.") 13, 17). This holding is consistent with numerous decisions in other states having consumer fraud statutes with identical "as a result of" language that have held, whether using the term "reliance" or "causation," that the plaintiff must establish that he saw, heard or read the offending ad, that the ad deceived him, and that the deception proximately caused him injury in fact. (*See infra*, p.14 n.7). It is simply not possible, after Proposition 64, for a plaintiff to demonstrate that he suffered injury in fact "as a result of" an alleged false ad that he did *not* see, hear or read.

Petitioners' last argument to support reversal – that the decision below cannot be reconciled with *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006) (*see* Petitioners' Brief on the Merits ("Pet. Br.") 4) – is belied by *Mervyn's* itself. To begin with, because the only issue in *Mervyn's* was whether Proposition 64 applied to actions filed before its enactment, this Court had no occasion to, and did not, construe the phrase "as a result of." Moreover, petitioners' argument (Pet. Br. 3) that the decision below is inconsistent with *Mervyn's* statement that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct" (39 Cal.4th at 232) confuses the standard for liability with a private action's standing requirements. Distributing advertisements that are likely to mislead consumers is as prohibited after Proposition 64 as before. Under Proposition 64, to have standing to sue, a private plaintiff must have "suffered injury in fact and lost money or property as a result of" the ad. A consumer who is *likely* to be deceived, but has not *in fact* been deceived, is plainly not a consumer who has been "injured," and thus lacks standing.

Indeed, it is petitioners' argument that cannot be reconciled with *Mervyn's*. In *Mervyn's*, not only did this Court state that "Proposition 64 does prevent *uninjured* private persons from suing for restitution on behalf of others," it also expressly stated that Proposition 64 "withdraws the stand-

ing of persons who have not been harmed *to represent those who have.*" 39 Cal.4th at 232 (emphasis added). The *Mervyn* Court's recognition that those who are represented in a class action have been harmed is directly contrary to petitioners' contention that the Proposition's standing requirements of injury in fact and loss of money or property as a result of a UCL violation do not apply to class members.

In short, the unanimous decision below was correctly decided and, accordingly, should be affirmed.

ARGUMENT

I.

PROPOSITION 64 APPLIES TO ALL CLASS MEMBERS

The Court of Appeal's holding that Proposition 64 applies to each class member is mandated by the application of black letter statutory construction rules to the Proposition's unambiguous language and by clear case law of this Court and the Court of Appeal.

A. Proposition 64's Plain Language Provides that the Proposition Applies to All Class Members

It is well established that where "statutory language is clear and unambiguous, its plain meaning must prevail." *Cal. Ins. Guarantee Ass'n v. Workers' Compensation Appeals Bd.*, 128 Cal.App.4th 307, 316 (2005). "'[I]t still remains true, as it always has, that there can be no intent in a statute not expressed in its words, and there can be no intent upon the part

of the framers of such a statute which does not find expression in their words.'" *City of Sacramento v. Public Employees' Retirement Sys.*, 22 Cal.App.4th 786, 793 (1994). These "'same principles that govern the construction of a statute'" apply to statutes enacted by citizen propositions. *People v. Foreman*, 126 Cal.App.4th 338, 342 (2005); *People v. Hinkel*, 125 Cal.App.4th 845, 851 (2005).

Proposition 64 could not be clearer. It expressly provides that a consumer must prove that he "suffered injury in fact and lost money or property as a result of" violation of the UCL to bring an action for relief, and that he cannot avoid this requirement by pleading the claim as a class action:

- Section 3 of Proposition 64 amended §17204 of the Business and Professions Code to provide that *all* "[a]ctions for *any* relief," including individual actions, "pursuant to this chapter shall be prosecuted . . . by the Attorney General or . . . by any person *who has suffered injury in fact and has lost money or property as a result of such unfair competition.*" (Emphasis added). Proposition 64 does *not* include class members in its exclusion of government officials from these standing requirements. *See Lake v. Reed*, 16 Cal.4th 448, 466 (1997) (applying *expressio unius* "maxim").

- Section 2 of Proposition 64 amended §17203 of the Business and Professions Code to provide that a plaintiff "may pursue representative claims or relief on behalf of others *only* if the claimant meets the standing requirements of Section 17204 *and* complies with Section 382 of the Code of Civil Procedure," which sets forth the requirements for class certification. (Emphasis added).

As this Court stated in *Branick v. Downey Savings & Loan Ass'n*, 39 Cal.4th 235, 240 (2006):

> After Proposition 64, *only* those private persons "who [have] suffered injury in fact and [have] lost money or property" (§§ 17204, 17535) may sue to enforce the unfair competition and false advertising laws. Uninjured persons may *not* sue (§§ 17204, 17535), and private persons may no longer sue on behalf of the general public (Prop. 64, § 1, subd. (f)). (Emphasis added).

Proposition 64's plain language is supported by its explanatory text, which confirms that its standing requirements apply to all class members. Thus, among the "misuse[s]" the people of California did "find and declare" in enacting Proposition 64 were that lawsuits had been filed where the plaintiff had not "viewed the defendant's advertising" or had not been "injured in fact." Prop. 64 §1(b)(2)-(3). It defies logic (and the plain reading of the statute) that, in enacting Proposition 64, California *barred* individual (and representative parties) from suing where they had not seen the

defendant's advertising (and thus, by definition, could not have been deceived or injured by it), but *permitted* recovery for the *very same persons* if they were class members. A person without standing to bring an individual action and recover on his or her own behalf, cannot be given standing and the ability to recover merely because that person becomes a member of a class in an action brought by someone else. The mechanism of a class is not for that purpose. To permit, as petitioners urge, a person who cannot sue individually to recover as a class member would not only be contrary to the clear language of the statute, but would turn class action jurisprudence on its head.

Nor is there even a hint in cases interpreting Proposition 64 that it applies differently to individual and class actions. To the contrary, courts have interpreted it as "requir[ing] that relief may be sought *only* by persons who have *themselves* suffered injury." *Harris v. Investor's Bus. Daily, Inc.*, 138 Cal.App.4th 28, 33 (2006) (emphasis added).[4]

Moreover, application of the class action typicality requirement confirms that Proposition 64's standing requirements apply to each class member. Thus, "[t]here can be no cognizable class unless it is first deter-

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[4] *See also, e.g., Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal.App.4th 1228, 1261 (2005) (Proposition 64 "require[s] that a private party may bring a representative action *only* if he or she meets the standing requirement of section 17204") (emphasis added).

mined 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) (holding in §17200 action that named plaintiff had not met typicality requirement because he did not believe the orange juice was "fresh" as advertised, had not read the entire label, and "would have had questions about the juice if he had read the whole label"). *Accord, Collins*, 187 Cal.App.3d at 72 (class members must have sustained a "common harm or damage"). In the words of Proposition 64, a named plaintiff who *suffered injury* as a result of the defendant's alleged deception is not typical of a class member who was *not* injured and *not* deceived.[5]

In sum, as this Court acknowledged in *Mervyn's*, Proposition 64 "*withdraws the standing* of persons who have not been harmed *to represent those who have*." 39 Cal.4th at 232 (emphasis added).

B. Clear Case Law Mandates Application of Proposition 64 to All Class Members

It is a basic principle that "'[e]ach class member must have standing to bring the suit in his own right.'" *Collins v. Safeway Stores, Inc.*, 187 Cal.App.3d 62, 73 (1986). That is because a class action "is merely a pro-

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[5] Not surprisingly, petitioners fail to cite a single case that remotely suggests – let alone holds – that the claim of a named plaintiff who has been injured by defendant's alleged unlawful actions is typical of that of a class member who suffered *no* actual injury *caused* by defendant's actions.

cedural device for consolidating" "individual" or "separate" "actions" of "many individuals" that otherwise would have to be "individually litigate[d]." *Vernon*, 52 Cal.App.3d at 716; *Washington*, 24 Cal.4th at 913; *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal.4th 319, 339 n.10 (2004); *Linder*, 23 Cal.4th at 435; *Blue Chip Stamps*, 18 Cal.3d at 386; *Weaver*, 32 Cal.2d at 838.

In attempting to distinguish *Collins*, petitioners concede, quoting *Collins*, that "'a class cannot be so broad as to include individuals who are without standing to maintain an action on their own behalf.'" (Pet. Br. 48, Pet. Reply Br. 1). Precisely. Petitioners then quote *Collins* to the effect that "there is no need to identify its individual members as a prerequisite to maintaining a class suit." (Pet. Reply Br. 2). Also true. But it is a far cry from saying that members do not have to be identified at the time of certification, to saying, as petitioners assert, that class members *never* have to establish standing or prove that, in the words of Proposition 64, they "suffered injury in fact and has lost money or property as a result of" the alleged unfair competition or false advertising. In short, consumers who are *un*harmed have *no* claim and can*not* be class members and cannot recover.[6]

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[6] Equally lacking in merit is petitioners' argument that the word "claimant" in Section 17203 somehow supports their position. (Pet. Br. 44-45). Section 17204, as amended by Proposition 64, provides that actions for relief pursuant to the UCL shall be prosecuted by

(continued...)

C. Petitioners' Misplaced Analogy to the Standing Requirements of Article III of the U.S. Constitution

Petitioners analogize the standing requirements of Proposition 64 to those of Article III of the U.S. Constitution, arguing that Article III does not require individual class members to have standing to assert the claims being asserted on their behalf by the named plaintiffs. (Pet. Br. 46-49, Pet. Reply Br. 9). The U.S. Supreme Court, however, has held that the "irreducible constitutional minimum of standing" requires a showing of "concrete and particularized" and "actual or imminent" "injury in fact," and "a causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *accord, Lance v. Coffman*, 2007 WL 632764, *1 (U.S. March 5, 2007). In addition, petitioners ignore the long standing rule that these requirements are "no less true with respect to class actions than with respect to other suits." *Lewis v. Casey*, 518 U.S.

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6 (...continued)
"any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." Thus, obviously, individuals, including potential members of a class, can only bring a claim under the UCL for relief in his or her own behalf if they meet this standing requirement. By saying in Section 17203 that a "claimant" may only seek relief on behalf of others if he or she meets the standing requirements of Section 17204 and the class action requirements of Section 382 of the Code of Civil Procedure, Proposition 64 eliminated the old representative action and makes clear that the class representative must have the same standing as individual members of the class.

343, 357 (1996). *Accord, Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976). Not surprisingly, petitioners fail to cite any case – and we are aware of none – where 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.

II.

PROPOSITION 64's STANDING REQUIREMENT THAT A PLAINTIFF HAVE SUFFERED INJURY "AS A RESULT" OF VIOLATION OF THE UCL REQUIRES A SHOWING OF CAUSATION

Proposition 64 expressly provides that, to assert a claim, a plaintiff must have "suffered injury in fact and lost money or property as a result of" the alleged violation of the UCL. That this provision requires the plaintiff to establish that the defendant's violation of the UCL *caused* the plaintiff's "injury in fact" and "los[s of] money or property" is mandated by the Proposition's express language and is fully consistent with decisions applying the same or similar language in California Civil Code §1780(a) and other states' consumer fraud statutes.

A. The Plain Meaning of Proposition 64

Proposition 64 expressly requires that a plaintiff prove that he "suffered *injury in fact* and lost money or property *as a result* of" the alleged deception. There is no ambiguity in this provision. The dictionary definition of "result" means "to proceed, spring or arise as a consequence, effect,

or conclusion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1937 (2002). Relying on this definition, the U.S. Court of Appeals held that the phrase "resulting from" in an insurance contract means "the test of proximate cause." *American Ins. Co. v. Keane*, 233 F.2d 354, 360 (D.C. Cir. 1956), citing MERRIAM-WEBSTER NEW INT'L DICTIONARY (2d ed. 1953).

Significantly, in interpreting the CLRA's identical language – that only a consumer "who suffers any damage[s] *as a result of* the use of a [prohibited] method, act or practice" "may bring an action," CAL. CIV. CODE §1780(a) (emphasis added) – the Court of Appeal held that "[r]elief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof." *Wilens*, 120 Cal.App.4th at 754. Indeed, the people of this State are "'deemed to [have been] aware'" of this "judicial construction[]" when they enacted Proposition 64 with the identical language. *Hobbs v. Municipal Ct.*, 233 Cal.App.3d 670, 682 (1991), quoting *People v. Weidert*, 39 Cal.3d 836, 844 (1985). As this Court explained in interpreting a citizen initiative by adopting the interpretation given to identical language in other statutes, "'[i]t is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had

been placed upon them by the courts.'" *In re Jeanice D.*, 28 Cal.3d 210, 216 (1980).

Moreover, numerous courts interpreting other states' consumer fraud statutes having identical "as a result" of language have held that the plaintiff must establish that he saw the offending ad, the ad deceived him, and the deception proximately caused him injury in fact.[7] In addition, the phrase "as a result of" in other California and state statutes has been held to require a showing of causation. *See, e.g., DePuy v. Bd. of Retirement*, 87 Cal.App.3d 392, 399 (1978) ("as a result of" language requires showing of a "causal connection"); *Am. Motorcycle Ass'n v. Superior Ct.*, 20 Cal.3d

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[7] *See, e.g., Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 148-49, 154-55 (Ill. 2002) (interpreting 815 ILCS 505/10a) ("as a result of" "imposes a proximate causation requirement"; *Hall v. Walter*, 969 P.2d 224, 235 (Col. 1998) (COL. REV. STAT. TIT. 6 §1-113(1)(a)); *Collins v. Anthem Health Plans, Inc.*, 275 Conn. 309, 334-36 (Conn. 2005) (CONN. GEN STAT. §§42-110b, g); *Rollins, Inc. v. Butland*, 932 So.2d 1172 (Fla. Ct. App. 2006) (FLA. STAT. §501.211(2)); *Tiismann v. Linda Martin Homes Corp.*, 637 S.E.2d 14, 16-17 (Ga. 2006) (OCGA §10-1-399); *Captain & Co. v. Stenberg*, 505 N.E.2d 88, 98 (Ind. Ct. App. 1987) (BURNS IND. CODE ANN. §24-5-0.5-4); *Vickers v. Interstate Dodge*, 882 So.2d 1236, 1244 (La. Ct. App. 2004) (LA. REV. STAT. §51:1409(A)); *State v. Weinschenk*, 868 A.2d 200, 209 (Me. 2005) (5 ME. REV. STAT. §213); *Feitler v. Animation Celection, Inc.* 13 P.3d 1044, 1047 (Or. Ct. App. 2000) (OR. REV. STAT. §646.638); *Weinberg v. Sun Co.*, 565 Pa. 612, 618 (Pa. 2001) (73 PA. STAT. §201-9.2); *Fields v. Yarborough Ford, Inc.*, 414 S.E.2d 164, 166 (S.C. 1992) (S.C. CODE ANN. §39-5-140); *Land v. Dixon*, 2005 Tenn. App. LEXIS 401, *12 (Tenn. App. Ct. July 12, 2005) (TENN. CODE. ANN. §47-18-109(a)(1)); *Lambert v. Downtown Garage, Inc.*, 1997 Va. Cir. LEXIS 457, *5-6 (Va. Cir. Ct. Nov. 25, 1997) (VA. CODE ANN. §59.1-204).

578, 586 (1978) (under "well-established common law principles," a plaintiff must establish that the defendant's conduct "was a proximate cause" in "order to recover damages sustained *as a result of*" the injury) (emphasis added); *Wise v. Superior Court*, 222 Cal.App.3d 1008, 1013 (1990) ("injury to plaintiff as a result of the breach (*proximate or legal cause*)" is an element of negligence) (emphasis added); 4 Witkin, CAL. PROCEDURE (4th ed. 1997) Pleading, § 537 at 624 (requiring that a plaintiff show the existence of an injury occurring "as a result of" defendant's conduct means that "*proximate or legal cause*" must be shown) (emphasis added); *Brown v. Gardner*, 513 U.S. 115, 119 (1994) ("'as a result of' language . . . is naturally read simply to impose the requirement of a causal connection"); *Williams v. U.S.*, 503 U.S. 193, 206 (1992).

B. None of Petitioners' Arguments Supports Ignoring the Plain Language of Proposition 64

1. Petitioners' Misplaced Reliance on the Likely-to-Deceive Standard for Violation of the UCL and on *Mervyn's*

Relying on pre-Proposition 64 cases, petitioners argue that this Court's rulings that the UCL provides for "strict liability" and that "to state a claim" under the UCL "one need only show that 'members of the public are likely to be deceived" mean that, despite Proposition 64's express language, it does not require a showing of causation. (Pet. Br. 23-24, quoting *Charles J. Vacanti, M.D. Inc. v. State Comp. Ins. Fund*, 24 Cal.4th 800,

827-28 (2001)). Petitioners, however, confuse the absence of a requirement of intent to defraud and the standard for determining whether an ad violates the UCL with the separate standing requirements of causation, injury in fact and loss of money or property Proposition 64 imposes as a condition for monetary recovery.[8] An ad that is likely to mislead the public violates the UCL and may be enjoined in an action by the Attorney General because, as the Court of Appeal held, under the express terms of Proposition 64, the Attorney General is "exempted from the UCL and class action standing requirements and may pursue a class action on behalf of the general public without a showing of an injury in fact." (*See* Op. 8, citing § 17203). Indeed, courts apply the same standard of violation under the CLRA – whether a statement is "likely to mislead a reasonable consumer"– as under the UCL. *Nagel*, 109 Cal.App.4th at 54. Nonetheless, as shown above (p.13), 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.

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[8] The UCL imposes "strict liability" in the sense that it does not require a showing that, as is required in a common law fraud action, 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).

Petitioners also argue, relying on *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983), that a plaintiff may bring a UCL action without "proving actual deception." (Pet. Br. 24). However, in *Children's TV* – a pre-Proposition 64 case – this Court had no need to, and did not, address the standard for standing for monetary recovery in a private UCL action and, of course, nowhere did it address the meaning of the phrase "as a result of." The other cases on which plaintiffs rely also do not address the standard for monetary recovery in a private UCL individual or class action.[9]

Nor is petitioners' reliance on *Mervyn's* well placed. The only issue in *Mervyn's* was whether Proposition 64 applied to actions filed before its enactment. This Court had no occasion to, and did not, construe the phrase

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[9] *See Blakemore v. Superior Ct.*, 129 Cal.App.4th 36 (2005) (reversing demurrer on liability grounds and remanding class certification issues); *Albillo v. Int'l Container Services, Inc.*, 114 Cal.App.4th 190 (2003) (stipulated class certification; partial reversal of judgment for defendant on liability grounds); *Schnall v. Hertz Corp.*, 78 Cal.App.4th 1144 (2000) (reversing demurrer on liability grounds) *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632 (1996) (representative action; reversing summary judgment on liability grounds); *People v. Toomey*, 157 Cal.App.3d 1 (1984) (action by Attorney General); *People v. Custom Craft Carpets, Inc.*, 159 Cal.App.3d 676 (1984) (action by Attorney General and district attorney); *California Ass'n of Dispensing Opticians v. Pearle Vision Center, Inc.*, 143 Cal.App.3d 419 (1983) (affirming preliminary injunction).

"as a result of."[10] Nevertheless, petitioners contend (Pet. Br. 26-30) that the decision below is in "conflict" with *Mervyn's* because of *Mervyn's* statement that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct." (39 Cal.4th at 232).

In asserting this argument, petitioners make the same mistake they make in relying on *Vacanti* and *Children's TV* – confusing the standard for liability with the standing requirements in a private action. After Proposition 64, distributing advertisements likely to mislead consumers is as prohibited as before, just as it is prohibited under the CLRA with its identical "as a result of" requirement. What has changed is that now a plaintiff, to have standing, must have "suffered injury in fact and lost money or property as a result of" violation of the UCL. Indeed, it is petitioners' argument that is irreconcilable with *Mervyn's*. *Mervyn's* expressly states that "Proposition 64 does prevent *uninjured* private persons from suing for restitution on behalf of others" (Court's emphasis), and that the Proposition "*withdraws* the standing of persons who have not been harmed *to represent those who have.*" 39 Cal.4th at 232 (emphasis added). A consumer who is *likely* to be

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10 *See Ginns v. Savage*, 61 Cal.2d 520, 524 n.2 (1964) ("Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.").

deceived, but has not *in fact* been deceived, is plainly not a consumer who has been "injured" or "harmed," and nothing in *Mervyn's* is to the contrary.

Moreover, this Court acknowledged in *Mervyn*'s "that now, as before, a private person may recover restitution only of those profits that the defendant has unfairly obtained from such person or in which such person has an ownership interest." 39 Cal.4th at 232, citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144-50 (2003). That the individual remedies available *to a person with standing* remain as narrow as before does not say anything about *when* a person has standing under Proposition 64.[11]

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[11] Furthermore, petitioners are quite wrong in their overbroad characterization of the scope of the individual remedies that were available under pre-Proposition 64 law to a person with standing. In holding in *Korea* that "remedies are limited" under the UCL and that the only monetary relief a court could order was restitution, this Court held that under the UCL, "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. *Id.* at 1144, 1148, 1150-51 (emphasis added). Thus, only "*[a]ctual direct victims* of unfair competition may obtain restitution as well." *Id.* at 1152 (emphasis added). *See also Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal.4th 116, 138 (2000) (*only* those present and former tenants who were overcharged were entitled to refunds). *Feitelberg v. Credit Suisse First Boston LLC*, 134 Cal.App.4th 997, 1013, 1020 (2005) (because "[w]ith restitutionary disgorgement, the focus is on the plaintiff's loss"); *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 697-98 (2006) ("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

(continued...)

2. Petitioners' Misplaced Reliance on a Federal District Court Decision

Petitioners heavily rely (Pet. Br. 38-42) on 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).

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 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.*

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[11] (...continued)
plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence") (emphasis added).

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*, *supra*, 402 F. Supp.2d at 1137. The Court's 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 ignored that one of the claims at issue in *Caro* was a §17200 claim. 18 Cal.App.4th at 652.[12]

At bottom, the court in *Anunziato* rejected the express causation requirement of Proposition 64 because it improperly engaged in its own policy analysis and applied 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

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12 Some courts have said reliance and causation are always the same and others have noted that they may sometimes differ. *Compare, e.g., Weinberg v. Sun Co.*, 565 Pa. 612, 617-18, 777 A.2d 442, 446 (Pa. 2001), with *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29-30, 731 N.E.2d 608, 612-13 (N.Y. 2000). This Court, however, need not decide the issue because, no matter how denominated, if the plaintiff did not see, read or hear the challenged ad, he or she was not injured "as a result of" the ad.

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 petitioners disagree with the causation requirement of Proposition 64, the remedy is at the ballot box, not in ignoring the plain language of the Proposition.[13]

Turning to the other federal district court decision, *Laster*, which petitioners ignore, it, unlike *Anunziato*, 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.*

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13 The court's ruling may have been premised on its mistaken assumption that a requirement of a showing of deception and injury "would eviscerate any purpose that the UCL and the [False Advertising Law] have independent of common law fraud." *Id.* at 1138. As noted above (*supra*, p.16 & n.8), however, §17200 and §17500, unlike common law fraud, do not require a showing that the defendant intended to injure or mislead the plaintiff.

Most recently, a third California federal district court has weighed in and rejected *Anunziato*, agreeing with *Laster* as "more persuasive." *Cattie v. Wal-Mart Stores, Inc.*, 2007 U.S. Dist. LEXIS 19980, *21 (S.D. Cal. March 21, 2007). The court analyzed the plain meaning of the statute and similar language in other statutes (such as the CLRA) and found:

> Requiring a plaintiff merely to show that she bought a product and that the product was falsely advertised would not, in the Court's opinion, show harm 'as a result of' the false advertisement. (*Id.*).

The Court also stated that to only require this very limited showing argued by plaintiff in that case (as well as the instant matter) "would blunt Proposition 64's intended reforms." *Id.*

* * *

When all is said and done, in the words of Proposition 64, a consumer who was unaware of, or who did not rely upon, the challenged advertising claim cannot suffer any "injury in fact" "as a result of" the alleged false advertising. This is consistent with numerous other decisions in other states having consumer fraud statutes with identical "as a result of" language that have held, whether using the term "reliance" or "causation," that plaintiff must establish that he saw, heard or read the offending ad, that the ad deceived him, and that deception proximately caused him injury in fact. (*See supra*, p.14 n.7). It is simply not possible after Proposition 64 for a plaintiff who did not hear, see or read an ad to demonstrate that he suffered

injury "as a result" of the alleged false ad. There is no need, however, for this Court to explore in this case the difference, if any, between causation and reliance because no matter which – or both – are required, the Court below did not abuse its discretion in decertifying the class, because individual issues of fact clearly predominate over any common issues (*see infra*, pp.27-31).

In all events, petitioners' reading of Proposition 64 would raise serious questions under the First Amendment and the "even 'broader and 'greater'" free speech guarantee in this State's Constitution. *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468, 491 (2000). That is because it would permit every class member to obtain restitution even if they never saw the ad or, for example, as was shown by a consumer survey in the *Galfano* case (*see infra*, p. 31), most were *not* misled.[14] *See Korea,* 29

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[14] It is antithetical to the First Amendment to penalize someone for providing *non*-misleading information. *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"); *Virginia 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").

Cal.4th at 1146 ("In ascertaining the Legislature's intent, [the court] attempt[s] to construe the statute to preserve its constitutional validity").

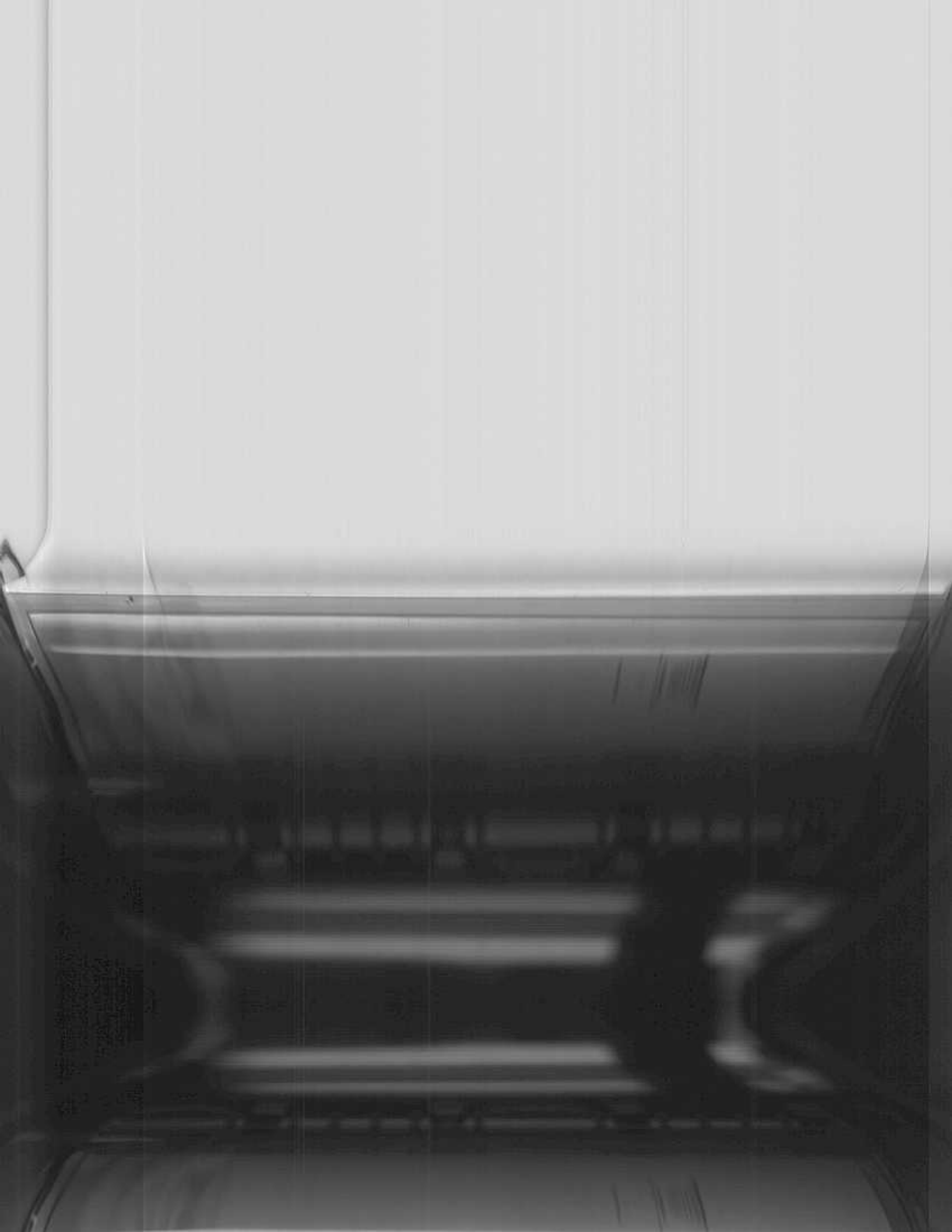
In sum, Proposition 64 – in accord with its express language – should be interpreted to permit monetary recovery by only those class members who were deceived by a challenged ad (and suffered injury in fact and lost money or property as a result thereof).

III.

THE COURT OF APPEAL CORRECTLY HELD THAT THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DECERTIFYING THE CLASS

A. Petitioners' Burden for Class Certification

To satisfy the requirements for class certification, "a plaintiff must establish . . . the existence of an ascertainable class and a well-defined community of interest among the class members." *Block v. Major League Baseball*, 65 Cal.App.4th 538, 542 (1998); *Sav-On*, 34 Cal.4th at 326; *Lockheed Martin Corp. v. Super. Ct.*, 29 Cal.4th 1096, 1104 (2003). This Court further has held that a class action may be certified "only where substantial benefits accrue both to litigants and the courts." *Linder*, 23 Cal.4th at 435; *City of San Jose v. Super. Ct.*, 12 Cal.3d 447, 459 (1974). "[W]hen potential recovery to the individual is small and when substantial time and expense would be consumed in distribution, the purported class member is unlikely to receive any appreciable benefit. The damage action being



unmanageable and without substantial benefit to class members, it must then be dismissed." *Blue Chip Stamps, supra*, 18 Cal.3d at 386. In short, a class action "must be the superior means of resolving the litigation, for both the parties and the court." *Newell v. State Farm Gen. Ins. Co.*, 118 Cal.App.4th 1094, 1101 (2004).

Equally clear is that the "burden is on the party seeking certification to establish" each requirement for certification "as a matter of fact," and not just that there is a "reasonable possibility" they may be. *Washington*, 24 Cal.4th at 913; *Hamwi v. Citinational-Buckeye Inv. Co.*, 72 Cal.App.3d 462, 471-72 (1977). Trial courts, thus, should carefully "scrutiniz[e] a proposed class cause of action," because "issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses." *Linder*, 23 Cal.4th at 443; *see Caro*, 18 Cal.App.4th at 656. Accordingly, the court must consider evidence submitted not only by plaintiff but also by defendant. *Quacchia v. DaimlerChrysler Corp.*, 122 Cal.App.4th 1442, 1448 (2004); *Norwest Mortg., Inc. v. Super. Ct.*, 72 Cal.App.4th 214, 221 (1999). As the Texas Supreme Court has stated, even if plaintiffs are "able to present their case in an expeditious manner," the defendant "is entitled to challenge the credibil-

ity of and its responsibility for each . . . claim individually." *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) ("basic to the right to a fair trial – indeed, basic to the very essence of the adversarial process – is that each party have the opportunity to adequately and vigorously present any material claims and defenses"). *Accord, Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indemnity Ins. Co.*, 319 F.3d 205, 220-21 (5th Cir. 2003).

B. The Court of Appeal Correctly Held that the Superior Court Did Not Abuse its Discretion in Finding that Common Issues of Fact Did Not Predominate Over Individual Issues of Fact

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

As a general rule, "the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining [the member's] individual right to recover following the 'class judgment' determining issues common to the purported class." *San Jose*, 12 Cal.3d at 459. *Accord, Washington,*

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

Even before Proposition 64, the Court of Appeal in *Caro* – a case petitioners ignore – affirmed an order denying class certification on facts similar to those here. Plaintiff alleged defendant violated Sections 17200 and 17500 and breached an express warranty by falsely advertising that its orange juice was "fresh" and "additive free." The Court affirmed denial of class certification on the ground that individual questions predominated because the named plaintiff "did not believe defendants' product to be 'fresh,'" and "[w]hether other class members believed the juice was 'fresh' . . . [and] whether the claim of 'no additives' constituted a material representation" to them "would be a matter of individualized proof." *Caro*, 18 Cal.App.4th at 668.

That is the exactly the case here, where it cannot be assumed that *each* class member was actually deceived. Only an individual inquiry of

each class member can determine if the member claims to have seen a challenged statement and, if so, which one or ones. That is because the only way to determine whether any statement misled a particular class member would be to inquire of *him* what message, if any, *he* took away from *that* ad, and whether the deception caused that class member any injury.

These are not merely hypothetical concerns, but reflect petitioners' own deposition testimony and the reality of the marketplace. Unlike in *Vasquez v. Superior Ct.*, 4 Cal.3d 800, 808-09 (1971), in which defendants' salesmen made the identical false representations in a memorized, face-to-face sales pitch to each class member, here, according to petitioners, there were a "series of misrepresentations" over "decades." (Pet. Br. 8-11). There is no basis to presume – let alone conclusively presume – that *every* class member saw and was deceived by *every* alleged misrepresentation and that *each* such misrepresentation *caused* each of them injury. Indeed, some of the petitioners admitted in their depositions that they had not seen the challenged statements and/or that the statements had no influence on their purchasing decisions. (*See* Defendants-Respondents ("Def.-Resp.") Br. 40-42). The only way that we know this is because defendants were able to take the petitioners' depositions. Yet petitioners would deny defendants the right to determine whether other members of the class also did not see the

challenged ads, were not misled by them, were not influenced by them, and/or were not injured by them.[15]

The need to cross-examine class members is particularly acute here because defendants have been granted summary adjudication on some of the challenged advertising statements. (*See* Op. 19, Def.-Resp. Br. 5-6, 9 n.2). Only by making an individual inquiry of each class member can it be determined if the class member's claim is based upon an actionable statement as opposed to one that is not actionable.

Nor is this situation unique to the facts of this case. It is commonplace that not all consumers see a particular ad and that not all of those who

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15 Petitioners' reliance (Pet. Br. 59-65) on *Vasquez* and *Occidental Land, Inc. v. Superior Ct.*, 18 Cal.3d 355 (1976), is, thus, misplaced. As this Court subsequently explained in *Mirkin v. Wasserman*, 5 Cal.4th 1082 (1993) – a decision petitioners pointedly fail to cite – *Vasquez* and *Occidental* "do not support an argument for presuming reliance on the part of persons who never read or heard the alleged misrepresentation" (*id.* at 1092-94):

> 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).

do see the ad take away the same message from the ad and are misled by it. Thus, for example, in *Galfano*, the named plaintiff did not see the challenged television commercials. Moreover, there was survey evidence that a whopping 70% of consumers did *not* take away the allegedly false implied message from the challenged commercial. Indeed, because 19 out of the 34 different Listerine flavors and sizes never included *any* label that made any floss comparison (and even for the 15 having such labels, not every bottle was shipped with an "as effective" label), there were many Listerine purchasers who never even saw the challenged claim, let alone were deceived by it. Thus, as is the case here, only an individual inquiry would determine which class members saw a challenged ad and were misled and which did not, which means that individual issues of liability predominate. In so ruling here, the decision below, like *Caro* earlier, is consistent with the numerous cases from across the country denying certification of consumer fraud class actions on the ground that individual issues predominated.[16]

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16 *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 567 (E.D. Ark. 2005); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 66-69 (S.D.N.Y. 2002); *Guillory v. Am. Tobacco Co.*, 2001 U.S. Dist. LEXIS 3353, *24-25 (N.D. Ill. 2001); *Williams v. Ford Motor Co.*, 192 F.R.D. 580, 585 (N.D. Ill. 2000); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 492, 503 (S.D. Ill. 1999); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 532 (N.D. Ill. 1998); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 372 (N.D. Ill. 1998); *Stephenson v. Bell Atlantic Corp.*, 177 F.R.D. 279, 294 (D.N.J. 1997); *Harding* (continued...)

At the end of the day, petitioners' argument is that it would be easier for them if they 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 them are the same as the facts as to everyone else in the class. Such an all or nothing single trial, at which defendants would be denied the right to cross-examine and present evidence in connection with particular purchases by particular class members, would violate defendants' due process rights, as well as the rights of other members of the class who would be stuck with the facts as to petitioners' claims 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 U.S. 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

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16 (...continued)
v. Tambrands, Inc., 165 F.R.D. 623, 630 (D. Kan. 1996); *Strain v. Nutri/Sys., Inc.*, 1990 WL 209325,*6 (E.D. Pa. Dec. 12, 1990); *Key v. Jewel Cos.*, 530 N.E.2d 1061, 1065 (Ill. App. Ct. 1988); *Charles Hester Enterps. v. Illinois Founders Ins. Co.*, 484 N.E.2d 349, 361 (Ill. App. Ct. 1985); *Cartiglia v. Johnson & Johnson Co.*, 2002 WL 1009473, *15-16 (N.J. Super. Ct. Law Div. Apr. 24, 2002); *Gross v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 696 A.2d 793, 797-99 (N.J. Super. Ct. Law Div. 1997).

> 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, 91 n.22 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)). *See also In re Gen'l 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").

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Dated: March 26, 2007

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-defendant Pfizer Inc., hereby certifies that this Answer to Petition for Review (including headings, footnotes and quotations, but excluding the tables of contents and authorities, and this certification) complies with the limitations of Rule of Court 8.204(b)(4) in that it is set in a proportionally spaced 13-point typeface and contains 10,590 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 26, 2007**, I served the foregoing document described as **APPLICATION TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-RESPONDENTS AND BRIEF *AMICUS CURIAE* OF PFIZER INC.** by placing a true copy of the above-entitled document in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

X by **U.S. MAIL** (I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.)

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

____ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **March 26, 2007**, at Los Angeles, California.

SHANTA TEEKAH
Name

S Teekah
Signature

SERVICE LIST

Brown, et al. v. Philip Morris Incorporated, et al.

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