THE FURTH FIRM LLP
ATTORNEYS AT LAW
225 BUSH STREET, 15TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104-4249
TELEPHONE (415) 433-2070
FACSIMILE (415) 982-2076
www.furth.com

SONOMA COUNTY OFFICE
10300 CHALK HILL ROAD
HEALDSBURG, CA 95448
TELEPHONE (707) 838-4379
FACSIMILE (707) 838-9685

September 8, 2006

VIA HAND DELIVERY

Honorable Chief Justice and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Pfizer, Inc. v. Superior Court*, case nos. B188106, S145775
Request for Depublication of Court of Appeal Opinion filed July 11, 2006

Dear Honorable Justices:

Pursuant to Rule of Court 979(a), I write on behalf of The Furth Firm LLP to request depublication of *Pfizer, Inc. v. Superior Court*, 141 Cal.App.4th 290 (Jul. 11, 2006) (case no. B188106, Second Appellate District, Division Three). A copy of the *Pfizer* opinion is enclosed. A petition for review and one other depublication request have already been filed with this Court (case no. S145775).

Statement of Interest and Summary of Argument

The Furth Firm LLP represents clients in several matters that may be adversely impacted if the *Pfizer* decision—which directly conflicts with this Court's recent opinion in *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006) (case no. S131798) ("*Mervyn's*")—remains a citable precedent. The purpose of our depublication request is to protect the interests of those clients.

Pfizer was handed down on July 11, 2006, without the benefit of guidance from *Mervyn's*, which was decided thirteen days later. Both opinions addressed the impact of Proposition 64 on the Unfair Competition Law (Bus. & Prof. Code §§17200 *et seq.*) and False Advertising Law (Bus. & Prof. Code §§17500 *et seq.*) (collectively "the UCL"). However, the two opinions reached widely divergent conclusions. While *Pfizer* held that Proposition 64 "dramatically restrict[ed] these consumer protection measures" (141 Cal.App.4th at 307), *Mervyn's* pronounced that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct" (39 Cal.4th at 232).

The two opinions cannot be reconciled. *Mervyn's* was decided by the higher Court and therefore impliedly overruled *Pfizer*. *Pfizer* should be depublished because it "contains misleading or incorrect language that might cause confusion" and because it "unnecessarily creates a conflict" with this Court's precedent in *Mervyn's*. *California Civil Appellate Practice*, §21.17 (CEB 3d ed. 1996). Alternatively, the pending petition for review should be granted.

The *Pfizer* Decision

Pfizer holds that Proposition 64 substantively amended the UCL in three ways:

(1) According to *Pfizer*, Proposition 64 added a "reliance" element that did not previously exist in UCL jurisprudence (141 Cal.App.4th at 305-07);

(2) According to *Pfizer*, Proposition 64 abolished the well-established "likely to deceive" formulation of the UCL's "fraudulent" prong (*id.* at 303-305); and

(3) According to *Pfizer*, Proposition 64 imposes these changes not only on the representative plaintiff, but on all of the class members as well (*id.* at 302-303).[1]

Pfizer's three holdings, if permitted to stand, represent a dramatic and substantive change from prior law as set forth in this Court's decisions.

This Court has repeatedly recognized that the UCL does not require proof that the plaintiff relied on the defendant's misstatements or other wrongful conduct. *See, e.g., Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1267 (1992) (UCL "authorized courts to order restitution without individualized proof of deception, reliance, and injury if necessary to prevent the use or employment of an unfair practice"); *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983) ("Allegations of ... reasonable reliance ... are unnecessary."); *Fletcher v. Security Pacific National Bank*, 23 Cal.3d 442, 451 (1979) ("This language, we believe, is unquestionably broad enough to authorize a trial court

[1] The *Pfizer* court did not have occasion to address whether Proposition 64 applied retroactively to pending cases because the plaintiff in *Pfizer* filed suit after Proposition 64's effective date (November 3, 2004). *Pfizer*, 141 Cal.App.4th at 296; *see* Cal. Const. art. II, §10(a). Nor had the Second Appellate District, Division Three issued any opinions analyzing Proposition 64's retroactivity or whether the amendments were substantive or procedural. This suggests that the panel had never considered the procedural/substantive distinction on which this Court relied in *Mervyn's*.

to order restitution without requiring the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction.").

This Court also established long ago that the UCL prohibits conduct that is "likely to deceive" consumers, and that proof that anyone was actually deceived is not required. *See, e.g., Kasky v. Nike, Inc.*, 27 Cal.4th 939, 951 (2002) ("[T]o state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, 'it is necessary only to show that "members of the public are likely to be deceived."'"); *Bank of the West*, 2 Cal.4th at 1266-67 ("[T]o state a claim under the act one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.'"); *Committee on Children's Television*, 35 Cal.3d 197 at 211 ("[T]o state a cause of action under these statutes for injunctive relief, it is necessary only to show that 'members of the public are likely to be deceived.'"); *Fletcher*, 23 Cal.3d at 451 ("Indeed our concern with thwarting unfair trade practices has been such that we have consistently condemned not only those alleged unfair practices which have in fact deceived the victims, but *also those which are likely to deceive them.*" (emphasis added)); *Chern v. Bank of America*, 15 Cal.3d 866, 876 (1976) ("Under this section, a statement is false or misleading if members of the public are likely to be deceived.").

The Courts of Appeal have applied the "likely to deceive" formulation when interpreting the UCL's "fraudulent" prong in dozens of cases spanning four decades.[2]

Pfizer compounded the impact of these two holdings by ruling that not only the representative plaintiff, but also every class member, must establish reliance and actual deception, which the UCL did not previously require. *Pfizer*, 141 Cal.App.4th at 302-303.

Mervyn's Implicitly Overruled *Pfizer*

Mervyn's was decided thirteen days after *Pfizer*. In *Mervyn's*, this Court addressed whether the Proposition 64's amendments to the UCL apply to cases filed before the

---

[2] *See, e.g., People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes*, 139 Cal.App.4th 1006, 1016 (2006); *Wayne v. Staples, Inc.*, 135 Cal.App.4th 466, 484 (2006); *Progressive West Insurance Co. v. Superior Court*, 135 Cal.App.4th 263, 284 (2005); *Bell v. Blue Cross*, 131 Cal.App.4th 211, 221 (2005); *Blakemore v. Superior Court*, 129 Cal.App.4th 36, 41 (2005); *Bernardo v. Planned Parenthood Federation of America*, 115 Cal.App.4th 322, 355 (2004); *Prata v. Superior Court*, 91 Cal.App.4th 1128, 1144 (2001); Day v. AT&T Corp., 63 Cal.App.4th 325, 334 (1999); *Macmanus v. A. E. Realty Partners*, 195 Cal.App.3d 1106, 1115 (1987); *Payne v. United California Bank*, 23 Cal.App.3d 850, 856 (1972); *People* ex rel. *Mosk v. National Research Co.*, 201 Cal.App.2d 765, 772 (1962).

Proposition passed. In holding that they do, the Court determined that the amendments were procedural, rather than substantive. *Mervyn's*, 39 Cal.4th at 231-32.

The *Mervyn's* decision states in no uncertain terms that "the measure does not change the legal consequences of past conduct by imposing new or different liabilities based on such conduct." *Id.* at 232 (emphasis added). Instead, "[t]he measure left entirely unchanged the substantive rules governing business and competitive conduct." *Id.* More particularly:

> Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover. Now, as before, no one may recover damages under the UCL, and 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.

Id. (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144-1150 (2003); *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266 (1992)).

The *Pfizer* court's holdings cannot be squared with this language from *Mervyn's*.

Under *Pfizer*, Proposition 64 "change[d] the legal consequences of past conduct" by eliminating defendants' liability for their fraudulent conduct unless the plaintiff—along with every member of the class—can affirmatively establish *reliance*. That holding would represent a substantive change in UCL jurisprudence. It would alter the liability principles that govern the courts' analysis of whether a defendant's conduct violates the UCL.

Similarly, under *Pfizer*, Proposition 64 "impos[es] new or different liabilities" on a defendant's conduct because now, conduct "likely to deceive" consumers is no longer privately actionable. In other words, conduct "likely to deceive" was "earlier forbidden," but is, in practical effect, "now permitted." *See Mervyn's*, 39 Cal.4th at 231 ("We consider the effect of a law on a party's rights and liabilities, not ... label[s] ....").

Finally, *Pfizer*'s holding that all class members, in addition to the representative plaintiff, must have suffered injury in fact could severely curtail the UCL's remedies. Before Proposition 64, the UCL authorized broad-ranging injunctive relief to prevent future injury to consumers whom the defendant's conduct had not yet harmed. If *Pfizer* stands, defendants can be expected to argue that courts may no longer issue such injunctions. Rather, defendants will argue that under *Pfizer*, all courts may do is order defendants to stop harming *the plaintiff*.

(who has already suffered injury in fact).[3] No one else could be encompassed by the injunction, defendants would assert, because no one else has suffered injury in fact yet, and any class must be limited to already-injured persons.

This would be an extreme, and substantive, limitation on the UCL's injunctive relief remedy. Yet, in *Mervyn's*, this Court held that Proposition 64 does not "eliminate any right to recover." 39 Cal.4th at 232. Moreover, Proposition 64 does not state that anyone other than the representative plaintiff must have "suffered injury in fact and lost money or property." On the contrary, the UCL, as amended, states that "[a]ctions for any relief pursuant to this chapter 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." Bus. & Prof. Code §17204 (emphasis added). It goes on to state that "[a]ny person may pursue representative claims or relief on behalf of others only if *the claimant* meets the standing requirements of Section 17204 ...." *Id.* §17203 (emphasis added). In other words, *Pfizer* holds that all class representatives must meet a requirement that the plain text of the statute imposes only on "the claimant," *i.e.*, the person "prosecut[ing]" the action. *Pfizer* is not only contrary to *Mervyn's*, but also diverges from the statute's unambiguous language.

All three of *Pfizer*'s holdings conflict with *Mervyn's*. If allowed to stand, they would represent three substantive changes in UCL jurisprudence. *Pfizer* cannot be reconciled with *Mervyn's* holdings that Proposition 64 "does not change the legal consequences of past conduct," does not "impos[e] new or different liabilities," "left entirely unchanged the substantive rules governing business and competitive conduct," and did not "eliminate any right to recover." 39 Cal.4th at 232.

In sum, *Pfizer* has been impliedly overruled. *Ex Parte Lane*, 58 Cal.2d 99, 105 (1962) ("It is an established rule of law that a later decision overrules prior decisions

---

[3] In its answer to the petition for review, petitioner/defendant Pfizer does not address the UCL's injunctive relief remedy. Instead, its answer focuses almost exclusively on the UCL's restitution remedy. For example, Pfizer argues that the Court of Appeal's holding is consistent with pre-Prop. 64 caselaw interpreting the UCL's restitution remedy. Citing *Korea Supply Co. v. Lockheed Martin Co.*, 29 Cal.4th 1134 (2003), *Colgan v. Leatherman Tool Corp.*, 135 Cal.App.4th 663 (2006), and other authorities, Pfizer asserts that consumers who have not suffered injury in fact could not have recovered restitution in any event, even if a class were certified, because restitution requires the loss of an ownership interest in money or property. Answer to Petition for Review, filed August 31, 2006, at pp. 27-28; *see Korea Supply*, 29 Cal.4th at 1149 ("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."). Even if this is true, it entirely ignores the impact of the Court of Appeal's holdings on the UCL's injunctive relief remedy.

which conflict with it, whether such prior decisions are mentioned and commented upon or not.").

Pfizer Should Be Depublished

Pfizer should be depublished to prevent confusion and uncertainty among the lower courts and the parties to UCL litigation.

If *Pfizer* is not depublished, UCL litigants across the state (including the undersigned) will argue at the trial court level that *Mervyn's* impliedly overruled it. Trial courts will have to grapple with this question, because impliedly overruled decisions are not binding on them. *See, e.g., Newport Beach Country Club, Inc. v. Founding Members of the Newport Beach Country Club*, 140 Cal.App.4th 1120, 1130-32 (2006) (assessing whether otherwise binding precedent has been impliedly overruled). This process can only lead to inconsistent rulings similar to those that precipitated this Court's grant of review in *Mervyn's* and its companion cases.

The Courts of Appeal—though not bound by *Pfizer*—will likewise be asked to hold that it has been overruled. They will simultaneously be asked to rely on it as persuasive authority. Future Court of Appeal panels should be able write on a clean slate when they interpret Proposition 64 as this Court construed it in *Mervyn's*. *See* Eisenberg, Horvitz & Weiner, *California Practice Guide: Civil Appeals & Writs* §11:180.1 (The Rutter Group 2005) (depublication appropriate where supreme court "wants future courts to be able to 'write on a clean slate'").

Finally, *Pfizer* could easily be "misuse[d] as precedent." *Id.* (depublication proper where "analysis was too broad and could lead to unanticipated misuse as precedent"). Because *Pfizer* does not mention *Mervyn's* at all, many litigants and courts may remain entirely unaware of its implied overruling, especially courts in other states, who are frequently led astray in UCL cases.[4]

To avoid these undesirable practical consequences, *Pfizer* should simply be depublished. Depublication will permit the lower courts to begin their analysis of Prop. 64 afresh in light of *Mervyn's*.

---

[4] *See, e.g., Bezuszka v. L.A. Models, Inc.*, 2006 WL 770526, *17 (S.D. N.Y. 2006), (holding, contrary to California law, that plaintiffs' individual UCL claims failed because plaintiffs "cannot allege a harm to the general public").

Alternatively, Review Should be Granted in *Pfizer*

As an alternative to depublication, The Furth Firm LLP respectfully asks the Court to grant the pending petition for review and resolve the issues raised by the interplay between *Pfizer* and *Mervyn's*.

Sincerely,

Kimberly A. Kralowec

Enclosure

cc: See attached proof of service