COURT OF APPEAL CASE NO. B188106
(Los Angeles Superior Court *Steve Galfano v. Pfizer Inc.*, Case No. BC327114)

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION THREE

PFIZER INC.,

Petitioner,

vs.

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

Respondent,

STEVE GALFANO,

Real Party in Interest.

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

RESPONSE OF REAL PARTY IN INTEREST TO THE AMICUS BRIEFS FILED IN SUPPORT OF PETITIONER

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INTRODUCTION

In their attempt to construe Proposition 64 in a way that would require each class member to prove actual reliance, causation, and damages no matter what the circumstances of Defendant's alleged deception, the *Amici Curiae* who have filed briefs in support of Defendant's position (collectively, "*Amici Curiae*") lose sight of the fact that Sections 17200 and 17500 of the Business and Professions Code (collectively, the "UCL") serve an important public purpose by providing a class action remedy for consumers who are mulcted by deceptive business practices. Adopting the arguments of *Amici Curiae* would frustrate this purpose by forcing consumers to bring a multitude of individual claims (rather a single class action) before the courts.

As artfully stated by the Ohio Court of Appeals while addressing the issues raised by *Amici Curiae* here:

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

Amato v. General Motors Corp. (1982) 11 Ohio App.3d 124, 126-127; 463 N.E.2d 625, 628-629 [internal citations and footnotes omitted; emphasis added].

For these reasons and the reasons set forth herein, Plaintiff again requests that this Court deny Defendant's writ of mandate.

LEGAL DISCUSSION

I. PROPOSITION 64'S INJURY IN FACT REQUIREMENT DOES NOT BAR CERTIFICATION OF PLAINTIFF'S UCL CLAIM.

Amici Curiae argue that class certification is inappropriate because Proposition 64 requires an individual inquiry to determine whether each class member suffered an injury in fact. Defendant's position, however, is contrary to a very recent and significant decision issued by the Second Appellate District, which was based upon facts completely analogous to the facts in the present case.

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

In Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, the plaintiff alleged that defendant Leatherman labeled and advertised that its products were "Made in U.S.A.", when in fact, a significant portion of the various parts of the products were manufactured outside the United States. Besides holding that Leatherman's "Made in U.S.A." representations were deceptive as a matter of law, Justice Mosk, writing for Division 5 of the Second District, also observed that restitution to the class represents "the value of the property at the time of its improper acquisition, retention or disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value or additions have been made to it." Id. at 669 [quoting Rest., Restitution, § 151, 598]. In the UCL context, the Court determined that, "the amount of restitution necessary to restore purchasers to the *status quo ante*" would include an expert's quantification of "either the dollar value of the consumer impact or the advantage realized by [the defendant]" as a result of its UCL violations (i.e., Leatherman's "Made in U.S.A." representation). Id. at 700.

Similar to Colgan, Plaintiff here alleges that Defendant labeled and advertised that its products were "As Effective as Floss", when in fact, it is not. *See* Complaint ¶¶ 1, 7, 9-11, 21 [EXP 00046-48, 50-51]; *see also* EXP 00134-135]; EXP 00121, 123-125. Pursuant to the rule set forth in Colgan, the injury in fact suffered by the class members in this case is "either the dollar value of the consumer impact or the advantage realized" by Defendant as a result of its misleading "As Effective As Floss" representation. Therefore, contrary to Defendant's argument, the injury in fact requirement of Proposition 64 does not impede class certification since ***each class member suffered the same injury***.

B. The Case Law Relied upon by Amici Curiae Is Distinguishable.

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

Collins, however, is factually distinguishable from the instant case. Collins was a class action against egg farmers for the sale and distribution of contaminated eggs. In that case, it was determined that not all the eggs had been contaminated, and even the contaminated eggs did not necessarily cause illness when ingested. Id. at 69, 74.

Unlike Collins, Defendant's alleged misrepresentations in this case were made on the label of each of the Listerine bottles purchased by class members. *See* Complaint ¶¶ 1, 7, 9-11, 21 [EXP 00046-48, 50-51]; *see also* EXP 00134-135. Thus, as discussed above, the

impact of the injury and the amount of restitution due to each class member is the same – i.e., "either the dollar value of the consumer impact or the advantage realized" by Defendant as a result of its misleading "As Effective As Floss" representation. *See* Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 669-700 [quoting Rest., Restitution, § 151, 598]. As such, the merits of the individual class members' claims can be resolved on a class basis.

Additionally, the California Supreme Court in Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, distinguished Collins and reversed the lower courts' denial of class certification, in as much as the merits of the individual class members' claims based upon their respective injuries could not be established on a class wide basis. Id. at 442. The Supreme Court in Linder further observed that its "holding is consistent with the weight of authority in other jurisdictions." Id. [citing case examples from Oklahoma, South Carolina, Arkansas, Iowa, Ohio, Washington, and Texas].

II. THE "AS A RESULT OF" LANGUAGE OF THE CLRA DOES NOT REQUIRE PLAINTIFF TO PROVE INDIVIDUAL RELIANCE OR CAUSATION.

Amici Curiae assert that because some California courts have interpreted the "as a result of" language of the Consumer Legal Remedies Act ("CLRA") to require causation, the UCL should be construed in the same manner. In support of this assertion, *Amici Curiae* reference a quote from Wilens v. TD Waterhouse Group, Inc. (2003) 120 Cal.App.4th 746, 15 Cal.Rptr.3d 271, which states, "Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof." Id. at 754. Not only

are the facts of Wilens distinguishable from the facts of our present case, the Wilens court also relied upon Massachusetts Mut. Life Ins. Co. v. Superior Court (2002) 97 Cal.App.4th 1282, 119 Cal.Rptr.2d 190, to support its holding. Accordingly, the rule cited by *Amici Curiae* from Wilen must be examined in the context of the holding from the court in Massachusetts Mutual, which addressed the same argument put forth by *Amici Curiae* and nonetheless affirmed the certification of a CLRA claim.

A. The CLRA Allows Causation and Reliance to Be Proven on a Class Basis.

In Massachusetts Mutual, *supra*, policyholders brought a class action lawsuit against a life insurer to recover for its violation of the CLRA. Similar to *Amici Curiae* here, the defendant in Massachusetts Mutual argued that the "as a result of" limitation requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm. In finding that the claims under the CLRA were suitable for treatment as a class action, the Court of Appeal explained the following:

> "Causation as to each class member is commonly proved more likely than not by materiality. That showing will undoubtedly be conclusive as to most of the class. The fact a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all." [Citation omitted.] Thus, "[i]t is sufficient for our present purposes to hold that if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class." [Quoting Vasquez v. Superior Court (1971) 4

Cal.3d 800, 814.]

Massachusetts Mut., 97 Cal.App.4th at 1292-1293, 119 Cal.Rptr.2d at 197. Accordingly, even this Court is persuaded by the arguments of *Amici Curiae* (i.e., that the "as a result of" language in both the CLRA and the UCL should be interpreted in the same manner), such is not a bar the certification of Plaintiff's UCL claims.

Similar to Plaintiff here, the plaintiffs in Massachusetts Mutual contended that "Mass Mutual failed to disclose its own concerns about the premiums it was paying and those concerns would have been material to any reasonable person contemplating the purchase of [a particular] premium plan." Massachusetts Mut., 97 Cal.App.4th at 1293, 119 Cal.Rptr.2d at 198. The court concluded that, "If plaintiffs are successful in proving these facts, the purchases common to each class member would in turn be sufficient to give rise to the inference of common reliance on the representations". Id.

In addition, "the information provided to prospective purchasers appears to have been broadly disseminated." Id. at 1294. The court explained, "[g]iven that dissemination, the trial court reasonably concluded that the ultimate question of whether the undisclosed information was material was a common question of fact suitable for treatment in a class action." Id.

Like the circumstances discussed in Massachusetts Mutual, here the record here permits an inference of common reliance. In this case, Plaintiff contends that Defendant made material misrepresentations to the class members by claiming that "the use of Listerine can replace the use of dental floss in reducing, among other things, plaque and gingivitis". Complaint ¶¶ 1, 10, 35(a) [EXP 00046-47, 55-56]. If Plaintiff is successful in proving these facts, the purchases common to each

class member would in turn be sufficient to give rise to the inference of common reliance on the representations. See Massachusetts Mut., 97 Cal.App.4th at 1293, 119 Cal.Rptr.2d at 198.

Also, as in Massachusetts Mutual, the information provided to prospective purchasers of Listerine was broadly disseminated[1] and made on the label of each of the Listerine bottles purchased by class members [*see* Complaint ¶¶ 1, 7, 9-11, 21 (EXP 00046-48, 50-51); *see also* EXP 00134-135]. Given these facts, the trial court could have reasonably concluded that the ultimate question of whether the alleged misrepresentations were material was a common question of fact suitable for treatment in a class action. Therefore, the trial court did not abuse its discretion in concluding that common questions of fact or law predominate as to Plaintiff's UCL claims.

B. Wilens Is Distinguishable from the Present Case.

In Wilens v. TD Waterhouse Group, Inc. (2004) 120 Cal.App.4th 746, 15 Cal.Rptr.3d 271, a stock trader filed a CLRA suit against a discount securities broker, challenging a clause in the broker's account contract giving the broker the right to terminate the account-holder's trading privileges without notice for any reason. Wilens, 120 Cal.App.4th at 750, 15 Cal.Rptr.3d at 272. In affirming the trial court's

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[1] As part of its "Flossing Claim" campaign, Defendant ran television commercials on countless national television and radio stations including, but not limited to, CNN, Good Morning America, and Fox News. Defendant also disseminated ads with such warranties and representations on its Listerine website and in newspapers of national or wide-spread circulation including USA Today, Time Magazine, Investors Business Daily, and The Washington Post. [EXP 00121, 123-125.]

decision not to certify a class, the appellate court explained that there could be no presumption that any class member was damaged either by inclusion of the clause in the contract or by termination of trading privileges without notices. Wilens, 120 Cal.App.4th at 755, 15 Cal.Rptr.3d at 276. The Wilens court held that if individual issues "go beyond mere calculation [of damage]" and instead "involve each class member's *entitlement* to damages", class treatment is inappropriate Wilens,120 Cal.App.4th at 756, 15 Cal.Rptr.3d at 277.

Here, unlike Wilens, there are no individual issues which involve each class member's entitlement to damages because Defendant's alleged misrepresentations were made on the label of each of the Listerine bottles purchased by class members. *See* Complaint ¶¶ 1, 7, 9-11, 21 [EXP 00046-48, 50-51]; *see also* EXP 00134-135]. As explained in Massachusetts Mutual, *supra*, this gives rise to a presumption of common reliance on the representations. See Massachusetts Mut., 97 Cal.App.4th at 1293. Furthermore, pursuant to Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, the amount of restitution due to each class member would be the same – i.e., "either the dollar value of the consumer impact or the advantage realized" by Defendant as a result of its misleading "As Effective As Floss" representation. Id. at 669-700 [quoting Rest., Restitution, § 151, 598]. Thus, the calculation of restitution can also be resolved on a class basis.

III. UNDER THE "LITTLE FTC ACTS" OF MOST STATES, LIABILITY CAN BE PROVEN EVEN IF THE PLAINTIFF DOES NOT PROVE RELIANCE, ACTUAL DECEPTION, OR CAUSATION.

Amici Curiae also argue that Proposition 64's "as a result of" language should be construed to require reliance, actual deception, and causation so as to be consistent with the interpretation of the "Little FTC Acts" of other states. *Amici Curiae's* argument, though, is contrary to the actual state of the law because, most courts have held that liability under a "Little FTC Act" can be proven even if the plaintiff does not prove reliance, actual deception, or causation.

A. Reliance and Actual Deception Need Not Be Shown on an Individual Basis.

The Federal Trade Commission ("FTC") and most courts have held that, in spite of a statute's "as a result of" language, reliance need not be shown or may be presumed in cases involving the FTC Act of "Little FTC Acts". In addition, virtually all courts hold that a plaintiff may prove a violation if the defendant's practice is likely to deceive even when considering the phrase, "as a result of".

1. FTC

As explained by *Amici Curiae*, California's UCL and the "Little FTC Acts" of individual states are patterned after the federal FTC Act [15 U.S.C. § 45]. Therefore, decisions by federal courts construing the FTC Act are "more than ordinarily persuasive" in guiding this Court to construe the UCL. People *ex rel.* Mosk v. National Research Co. Of Calif. (1962) 201 Cal.App.2d 765, 772-773; 20 Cal.Rptr. 516, 521-522. *See also* Cel-Tech Communications, Inc. v. Los Angeles Cellular

Telephone Co. (1999) 20 Cal.4th 163, 184; 83 Cal.Rptr.2d 548, 564 [The California Supreme Court noted that, in devising a test under the UCL, courts may turn for guidance to the jurisprudence arising under the FTC Act.]; O'Conner v. Superior Court (1986) 177 Cal.App.3d 1013, 1018; 223 Cal.Rptr. 357, 360; People v. Toomey (1985) 157 Cal.App.3d 1, 15; 203 Cal.Rptr. 642, 651; People v. Casa Blanca Convalesent Homes, Inc. (1984) 159 Cal.App.3d 509, 530; 206 Cal.Rptr. 164, 177.

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

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

FTC v. Standard Education Society (1937) 302 U.S. 112, 116; 58 S.Ct. 113, 115; 82 L.Ed. 141.

The Ninth Circuit of the United States Court of Appeals interpreted the FTC Act as follows:

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

> ***defendant's product.*** [Citations omitted.] Some courts hold that at this point, the burden shifts to the defendant to prove the absence of reliance. [Citations omitted.]

FTC v. Figgie Int'l, Inc. (9th Cir. 1993) 994 F.2d 595, 605-606 [emphasis added]. *See also* Trans World Accounts, Inc. v. FTC (9th Cir. 1979) 594 F.2d 212, 214 [Proof of actual deception is unnecessary to establish a violation of the FTC Act. Misrepresentations are condemned if they possess a tendency to deceive.]; McGregor v. Chierico (11th Cir. 2000) 206 F.3d 1378, 1388 ["Proof of individual reliance by each purchasing customer is not a prerequisite to the provision for equitable relief to redress fraud under the FTC Act."].

The guidance offered by the federal courts above with regard to the FTC Act is equally applicable to actions brought under California's UCL. Like the federal FTC Act, California's UCL (as amended by Proposition 64) serves a public purpose by authorizing a person "who has suffered an injury in fact and lost money or property as a result of [a UCL violation]" to seek redress on behalf of injured consumers. In this case, a presumption of actual reliance arises once Plaintiff proves that (1) Defendant made material misrepresentations to the class members by claiming that "the use of Listerine can replace the use of dental floss in reducing, among other things, plaque and gingivitis" [Complaint ¶¶ 1, 10, 35(a) (EXP 00046-47, 55-56)]; (2) the misrepresentations were widely disseminated [see FN 1, *infra*]; and (3) consumers purchased Defendant's product [Complaint ¶¶ 13, 16-17 (EXP 00048-49)]. *See* FTC v. Figgie Int'l, Inc. (9th Cir. 1993) 994 F.2d 595, 605-606. Thus, proof of actual reliance and deception by each individual class member is unnecessary to establish a UCL violation. To require such would thwart effective prosecutions of large consumer

redress actions and frustrate the goals of the UCL.

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

Many courts follow the FTC's lead and hold that actual reliance and deception are not required under the "Little FTC Acts" of individual states. Below are just a few examples.

Illinois

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

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

Like California's UCL, the District Court further explained that Illinois' Consumer Fraud and Deceptive Business Practices Act

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

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

Michigan

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

The Supreme Court of Michigan recognized:

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

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

New York

Although it does not use the exact phrase, "as a result of", New York's "Little FTC Act" is similar to California's UCL in that it states, "any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his damages or fifty dollars, which ever is greater, or both such actions." NY Gen. Bus. Law § 349(h). In reversing a lower court's order denying class certification, the Appellate Division of the New York Supreme Court held that there is no need to show reliance to certify a class under New York's "Little FTC Act". Weinberg v. Hertz Corp. (NY App. 1986) 116 A.D.2d 1, 7.

Ohio

Similarly, Ohio's Consumer Sales Practices Act allows a consumer to recover damages or other appropriate relief in a class action when he or she is subjected to behavior which has been declared to be deceptive or unconscionable. Ohio Rev. Code § 1345.09. With regard to this statute, the Ohio Court of Appeals explained, "Ohio courts have consistently construed the applicable provisions of the Consumer Sales Practices Act as only requiring proof that the conduct complained of has the likelihood of inducing in the mind of the consumer a belief which is not in accord with the facts." Shaver v. Standard Oil Co. (1993) 89 Ohio App.3d 52, 63; 623 N.E.2d 602, 609.

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

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

Amato, 11 Ohio App.2d at 126-127; 463 N.E.2d at 628-629 [internal

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

Connecticut

Also similar to California's UCL, the Connecticut Unfair Trade Practices Act ("CUTPA") provides that "[a]ny person who suffers any ascertainable loss of money or property ... ***as a result of*** ... a method, act or practice prohibited by [the CUTPA] may bring an action ... to recover actual damages." Conn.Gen.Stat. § 42-110g(a) [emphasis added]. The United States District Court for the District of Connecticut explained that, "[a]n act or practice is considered deceptive under [the] CUTPA if it has a 'tendency or capacity to deceive.' [Citation omitted.] Plaintiffs need not prove reliance or that the alleged unfair or deceptive representation became part of the basis of the bargain. [Citation omitted.]" Aurigemma v. Arco Petroleum. Prod. Co. (Conn. 1990) 734 F.Supp. 1025, 1029. Accordingly, Connecticut also holds that "as a result of" does not mean that reliance is a requisite element of liability under its Act.

Missouri

Also like California's UCL, Missouri's Merchandising Practices Act states, "Any person who purchases or leases merchandise ... and thereby suffers an ascertainable loss of money or property ... ***as a result*** of the use or employment by another person of a method, act or practice declared unlawful by [this Act] may bring a private civil action

... to recover actual damages." Missouri Revised Statutes § 407.025(1) [emphasis added].

In affirming a trial court's award of rescission and restitution, the Missouri Court of Appeals found that, "[i]t is not necessary in order to establish 'unlawful practice' to prove the elements of common law fraud. [Citation omitted.] ... We also do not find that proof of reliance by customers is a necessary element of such cases." State *ex rel.* Webster v. Areaco Inv. Co. (Mo.App. 1988) 756 S.W.2d 633, 635. The Court further explained:

> The entire thrust of the Merchandising Practices Act is that consumers rely upon the fair dealing of those selling merchandise and services. When that fair dealing obligation has been breached, the customer may, in the discretion of the court, rescind the transaction. ***It is presumed from the statute that the customer has relied upon the obligation of fair dealing in making his purchase.***

Id. at 637 [emphasis added]. In short, the "as a result of" language in Missouri's statute likewise does not require a plaintiff to prove reliance.

Insofar as the language of a California statute is the same as that of another state, California courts will generally give the same construction as the other states' courts. Erlich v. Municipal Court (1961) 55 Cal.2d 553, 558; 11 Cal.Rptr. 758, 761; *see also* Estate of Salisbury (1978) 76 Cal.App.3d 6354, 642; 143 Cal.Rptr. 81, 85. Thus, because the language of California's UCL has the same "as a result" language as many of the states discussed above and specifically provides for the maintenance of class actions, Plaintiff respectfully requests that this Court likewise hold that actual reliance and deception are not required elements under the UCL and affirm the trial court's

order granting class certification. As explained above, proof of Defendant's extensive advertising [see FN 1, *infra*] is sufficient to make a *prima facie* case for actual exposure.

B. Courts Interpreting the "Little FTC Acts" of Other States Hold That Causation Is Inherent in the Simple Fact That Class Members Purchased Defendant's Product.

Like reliance, issues regarding the related issue of causation are not a bar to the certification of Plaintiff's UCL claim. If causation is required, courts interpreting other states' "Little FTC Acts" have held that it may be inherent in the simple fact that class members purchased Defendant's product.

For example, in a case where a cruise company billed for "port charges" as if they were a pass-through of government taxes and fees, the Florida District Court held that the fact that the consumer paid no attention to that term of the bill and paid the bill willingly was irrelevant in determining whether the cruise company violated the Florida Deceptive and Unfair Trade Practices Act[2]. Latman v. Costa Cruise Lines, N.V. (Fla. 2000) 758 So.2d 699, 703. In other words, the court found that causation was inherent in the fact that the plaintiffs purchased cruise tickets and paid the charges. *See also* Dix v. American Bankers Life Assurance Co., *supra*, 429 Mich. at 418; 415 N.W.2d at 209 ["It is sufficient if the class can to establish that a

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[2] Similar to California's UCL, the Florida Deceptive and Unfair Trade Practices Act states, "In any individual action brought by a consumer who has suffered a loss ***as a result of*** a violation of this part, such consumer may recover actual damage, plus attorney's fees and court costs ..." Fla. Stat. § 501.211(2).

reasonable person would have relied on the representations."]. Therefore, these holdings further support Plaintiff's position that causation (if required) may be established without individual proof from each class member. [*See also* Section II.A, *infra.*]

IV. EVEN IF EACH CLASS MEMBER WAS REQUIRED TO JUSTIFY AN INDIVIDUAL CLAIM, SUCH DOES NOT PRECLUDE MAINTENANCE OF A CLASS ACTION IN THIS CASE.

Amici Curiae erroneously suggest that trial courts must deny class certification when each member's right to recover depends upon facts individual to the member's case. However, in addition to the fact that individual issues of reliance and causation clearly will not predominate in this case because such can be shown on a class basis (see Sections II and III, *infra*), Defendant's argument is also flawed because it is contrary to the law set forth by the California Supreme Court in Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 96 P.3d 194, 17 Cal.Rptr.3d 906. In Sav-On, the Supreme Court specifically held as follows:

> "[A] class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages." [Citation omitted.]
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> **********
>
> [E]ven if some individualized proof of such facts ultimately is required to parse class members' claims, that such will predominate in the action does not necessarily follow. We long ago recognized "that each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action." [Citation omitted.] Predominance is a comparative

> concept, and "the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate." [Citations omitted.] Individual issues do not render class certification inappropriate so long as such issues may effectively be managed. [Citations omitted.]
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> **********
>
> The Court of Appeal also erred to the extent it stated or implied that the community of interest requirement for certification mandates that class members' claims be uniform or identical. Plaintiff's theory does not depend on class members having identical claims, nor does the law of class certification require such. [Citation omitted.]

Id. at 333-334, 338-339.

Accordingly, even if each class member may at some point be required to make an individual showing as to reliance and/or causation (which Plaintiff wholly disputes; *see* Sections II and III, *infra*), such does not preclude class certification because the law does not require class members to have identical claims.

And while *Amici Curiae* would undoubtedly prefer that courts be burdened with a multitude of individual UCL claims, rather than a single class action, it would be far more efficient to adopt a method of resolving any individual issues that may exist with regard to reliance and causation on a class basis. In Sav-On, *supra*, the California Supreme Court explained the following:

> Courts seeking to preserve efficiency and other benefits of class actions routinely fashion methods to manage individual questions. [FN omitted.] For decades "[t]his court has urged trial courts to be procedurally innovative" [citation omitted] in managing class actions, and "the trial court has an obligation to consider the use of ... innovative procedural tools proposed by a party to certify a manageable class" [citation omitted].

Id. at 339.

Furthermore, in her concurring opinion in Sav-On, Justice Brown noted that class certification is proper where otherwise individual issues "may be susceptible to common proof." Id. at 343. That analysis applies with equal force in this case. As explained above and in Plaintiff's opposition papers, courts both inside and outside of California have repeatedly held that the issues of reliance and causation (if required) are susceptible to common proof. *See* Sections II and III, *infra*; *see also,* Vasquez v. Superior Ct. (1971) 4 Cal.3d 800; Occidental Land, Inc. v. Superior Ct. (1976) 18 Cal.3d 355; National Solar Equip. Owners' Assn, Inc. v. Grumman Corp. (1991) 235 Cal.App.3d 1273; Danzig v. Superior Ct. (1978) 87 Cal.App.3d 604; Metowski v. Traid Corp. (1972) 28 Cal.App.3d 332; Whiteley v. Philip Morris Inc. (2004) 117 Cal.App.4th 635.

Because Defendant represented that Listerine is "As Effective As Floss" on the label of the Listerine bottles purchased by each class member [Complaint ¶¶ 1, 7, 9-11, 21 (EXP 00046-48, 50-51); *see also* EXP 00134-135], the fact that each class member bought the product is sufficient to create a presumption of reliance and causation. Thus, substantial evidence supports the trial court's finding of commonality for class certification purposes.

V. FALSE OR MISLEADING SPEECH HAS NO PROTECTION UNDER THE CONSTITUTION.

Amici Curiae also illogically assert that the trial court's construction of the UCL violates the First Amendment and the Free Speech Clause of the California Constitution. This assertion, however, is absurd since Proposition 64 did not change the fact that false,

deceptive, or misleading advertising is simply not protected speech; thus, states can regulate and even prohibit such speech. City of Cincinnati v. Discovery Network, Inc. (1993) 507 US 410, 431-432; 113 S.Ct. 1505, 1518. *See also* Greater New Orleans Broadcasting Assn. v. U.S. (1999) 527 U.S. 173, 119 S.Ct. 1973; Central Hudson Gas & Elec. Corp. v. Public Service Comm'n (1980) 447 U.S. 557, 100 S.Ct. 2343; Friedman v. Rogers (1979) 440 U.S. 1, 99 S.Ct. 887; Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 98 S.Ct. 1912; Bates v. State Bar of Arizona (1977) 433 U.S. 350, 97 S.Ct. 2691; Linmark Associates, Inc. V. Township of Willingboro (1977) 431 U.S. 85, 97 S.Ct. 1614; Virginia Pharmacy Board v. Virginia Consumer Council (1976) 425 U.S. 748, 96 S.Ct. 1817.

In fact, the California Court of Appeal has already held that the UCL can be used to challenge such speech. People v. Superior Court (Olson) (4th Dist., 1979) 96 Cal.App.3d 181, 195; People v. Columbia Research Corp. (1st Dist., 1977) 71 Cal.App.3d 607, 614. Further, the Second District specifically held that unsubstantiated advertising can even be banned altogether. People v. Custom Craft Carpets, Inc. (2d Dist., 1984) 159 Cal.App.3d 676, 683. Accordingly, the First Amendment argument of *Amici Curiae* is wholly without merit.

VI. A SET OF FACTS WHICH GIVES RISE TO A PRODUCT LIABILITY CAUSE OF ACTION CAN ALSO BE THE SUBJECT OF A CAUSE OF ACTION UNDER THE UCL.

Last, *Amici Curiae* contend that courts should not permit plaintiffs to assert UCL claims when a claim sounds in product liability. This faulty contention must be rejected for two principle reasons. First, because California courts allow UCL actions to proceed even if they

arise out of the same sequence of events as a product liability claim and *Amici Curiae* fail to relate their argument to changes made to the UCL after the enactment of Proposition 64, *Amici Curiae's* contention is unsupported. Second, this argument has been rejected by other courts which find that "Little FTC Acts" may properly arise out facts which may also give rise to a cause of action for product liability.

A. California Courts Allow UCL Actions to Proceed Even If They Arise out of the Same Sequence of Events as a Product Liability Claim.

California's UCL has been and will continue to be useful in cases arising out of facts which also give rise to a product liability claim. For example, in Nagel v. Twin Labs (2003) 109 Cal.App.4th, 134 Cal.Rptr.2d 420, an individual brought a class action complaint under the UCL against the manufacturer of a nutritional supplement, alleging that the manufacturer misrepresented the ephedrine content on its product label. Id. at 42-44. Similarly, in Scott v. Metabolife Int'l, Inc. (2004) 115 Cal.App.4th 404, 9 Cal.Rptr.3d 242, a consumer sued the manufacturer of dietary supplements, claiming both strict products liability and UCL violations. Scott, 115 Cal.App.4th at 407-410, 9 Cal.Rptr.3d at 244-246. In allowing such actions to proceed under the UCL, the Court of Appeal in both cases affirmed the trial courts' orders denying the defendants' motions to strike finding that the plaintiffs demonstrated a probability of prevailing on the merits. Nagel, 109 Cal.App.4th at 51-55; Scott, 115 Cal.App.4th at 407-408, 9 Cal.Rptr.3d at 244. Nothing in Proposition 64 impacts a consumer's ability to bring a UCL action in cases such as these.

B. *Amici Curiae's Argument Has Been Rejected by Other Courts Which Find That "Little FTC Acts" Apply to Claims Arising out of a Set of Facts Which May Also Give Rise to a Cause of Action for Product Liability.*

The same argument made by *Amici Curiae* has also been addressed and rejected by other courts examining the applicability of a state's "Little FTC Act" for claims sounding in product liability.

For instance, in Pomianowski v. Merle Norman Cosmetics, Inc. (Ohio 1980) 507 F.Supp. 435, a consumer brought an action against a cosmetic product manufacturer, claiming (1) strict liability in tort for marketing a defective or dangerous product, without warning or instruction to potential consumers thereof, and (2) violations of Ohio's Consumer Sales Practice Act resulting from misrepresentations made regarding the qualities or characteristics of its product. Id. at 436. Similar to *Amici Curiae's* argument here, the defendant in Pomianowski argued that because the conduct complained of arises in a product liability transaction, a claim under Ohio's Consumer Sales Practice Act should not be available to her. Id. at 437. The District Court, however, rejected the defendant's argument, explaining that the nature of the remedies created by Ohio's Consumer Sales Practice Act and the remedies created by common law products liability may properly arise out of the same sequence of events. Id. at 437. The court then concluded that a consumer personally injured by a misrepresented defective product may obtain relief for both (1) nonpersonal losses growing out of the deceptive sales conduct, and (2) personal injuries by joinder of the common law products liability claim with the statutory cause of action. Id. at 438.

Similarly, in Keller Indus., Inc. v. Reeves (Tex. App. 1983) 656 S.W.2d 221, a plaintiff brought suit alleging causes of action under the

doctrine of strict liability in tort and violations of Texas' Deceptive Trade Practices Act against a retailer and manufacturer of an aluminum stepladder. Id. at 223. Again, in addressing the same argument set forth by *Amici Curiae* here, the Texas Court of Appeals held that a set of facts which gives rise to a cause of action in strict liability for a defective product can also be the subject of a cause of action under Texas' Deceptive Trade Practices Act. Id. at 224-225.

Accordingly, *Amici Curiae's* argument that the UCL is not meant to address the same facts as product liability claims is wholly without merit.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's petition for a writ of mandate.

Dated: May 12, 2006

Respectfully submitted,

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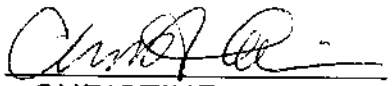
CERTIFICATION

I, Christine C. Choi, an attorney at law duly admitted to practice before all the courts of the State of California and an associate of the law firm of Westrup Klick LLP, attorneys of record herein for plaintiff and real party in interest Steve Galfano, hereby certify that this document (including the memorandum of points and authorities headings, footnotes, and quotations, but excluding the tables of contents and authorities and this certification) complies with the limitations of Rule of Court 14(c) in that it is set in a proportionally-spaced 13-point typeface and contains 6,744 words as calculated using the word count function of WordPerfect.

By: 
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PROOF OF SERVICE BY U.S. MAIL

At the time of service I was over 18 years of age and not a party to this action. My business address is 444 West Ocean Boulevard, Suite 1614, Long Beach, California 90802-4524.

On May 15, 2006, I served the following documents described as **RESPONSE OF REAL PARTY IN INTEREST TO THE AMICUS BRIEFS FILED IN SUPPORT OF PETITIONER**. I served the documents on all interested parties, as follows:

PLEASE SEE ATTACHED SERVICE LIST

The documents were served by United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am employed in the county where the mailing occurred. The envelope or package was placed in the mail at Long Beach, California.

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

Date: May 15, 2006

LIZ BROWN

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