STAMP AND RETURN

COURT OF APPEAL CASE NO. B188106

(LOS ANGELES SUPERIOR COURT *STEVE GALFANO v. PFIZER INC* CASE NO. BC 327114)

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE

PFIZER INC,
Petitioner,
vs.

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

STEVE GALFANO,
Real Party in Interest.

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

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., AND THE COALITION FOR HEALTHCARE COMMUNICATION IN SUPPORT OF PETITIONER PFIZER INC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE CONSTITUTION AND STATUTES

MISCELLANEOUS

INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber"), the Association of National Advertisers, Inc. ("ANA"), and the Coalition for Healthcare Communication ("CHC") (collectively "*Amici*") respectfully submit this brief as *amici curiae* in support of Petitioner Pfizer Inc.

The Chamber is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber has thousands of members in California and thousands more located elsewhere that conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation, including courts in California, by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The ANA's mission is to provide indispensable leadership that drives marketing communications, media and brand management excellence and champions, promotes and defends industry interests. The ANA is the industry's foremost and recognized source of marketing

communications best practices. It also leads industry initiatives, influences industry practices, manages industry affairs, and advances, promotes and protects all advertisers and marketers. The association represents 370 companies with 8,000 brands that collectively spend over $100 billion in marketing communications and advertising. Many of ANA's members are headquartered in California, and the vast majority carry out extensive advertising activities within the State.

CHC defends the right of health professionals and consumers to receive truthful information regarding pharmaceuticals and medical products, as safeguarded by the Constitution of the United States. Founded in 1991, the CHC represents organizations, rather than individuals, and is dedicated to assuring the free exchange of scientific information without undue government interference.

Collectively, *Amici* and their members are experts in communicating commercial information to the public at large. *Amici's* members use advertising to provide information of consumer interest and, consistent with the First Amendment, to assist consumers in making choices of daily importance. *Amici* believe that the California Superior Court's decision, by permitting self-appointed private attorneys general to foist massive threats on advertisers, will seriously impair the ability of *Amici's* members to communicate with Californians and others that come in contact with advertising published in the California marketplace. *Amici* have a direct

and continuing interest in this case and similar cases that threaten the rights of advertisers to communicate freely and truthfully with the public.

INTRODUCTION

In recent years, California's Unfair Competition Law (Bus. & Prof. Code, §§ 17200 *et seq.*) (the "UCL") became the subject of widespread criticism. Among other things, the law anomalously permitted "any person" to sue on behalf of the public at large for false advertising, regardless of whether that person or anyone else had suffered an injury as a result of the alleged false advertising. Because it permitted representative suits on behalf of the public by anyone who could afford the filing fee, the UCL was a bonanza for nominal plaintiffs and their attorneys who often commenced and maintained frivolous actions as a means of reaping substantial attorneys' fee awards, without creating any corresponding public benefit. Acknowledging that the UCL lacked any injury-in-fact requirement, at least five justices of the United States Supreme Court recognized that the law was constitutionally problematic. (*Nike, Inc. v. Kasky* (2003) 539 U.S. 654.)

To remedy these abuses, California voters approved Proposition 64 in 2004. Proposition 64 amended Section 17204 of the UCL so that actions can be commenced and maintained in the name of a private citizen only if that person "has suffered injury in fact and has lost money or property as a result of such unfair competition." (Proposition 64, § 3; *see* Bus. & Prof.

Code, § 17204.) Further, Proposition 64 barred private citizens from filing representative actions on behalf of the public, conferring such exclusive authority on duly elected or appointed government attorneys: "It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." (Proposition 64, § 1(f).)

Despite the plain language of Proposition 64 and the unmistakable intent of California voters, the trial court's decision below effectively undoes Proposition 64 by certifying a class action suit against Pfizer without any consideration of whether the class representative has made a threshold showing that *each member of the class* has suffered actual economic injury. The trial court's construction of Proposition 64 turns the UCL on its head by ignoring the prohibition on private actions for general public benefit and permitting class membership to extend to individuals who could not maintain claims on their own. The trial court's decision below should therefore be reversed.

The trial court's decision also should be reversed on the separate and independent ground that it continues to put the UCL in jeopardy under the Fourteenth Amendment to the United States Constitution (incorporating the First Amendment) and the Free Speech Clause of the California Constitution. Traditional common law suits by private actors do not offend the First Amendment and its California counterpart because they are

bounded by injury requirements that obviate constitutional concerns. Injury-in-fact and economic loss requirements shield protected speech by ensuring that liability is imposed only on terms that serve the government's interests in preventing marketplace fraud and restoring injured parties to the ex ante status quo. These requirements serve to maintain the delicate balance between the competing interests inherent in protecting free expression while policing the integrity of commercial transactions.

By contrast, to allow private actors with purely hypothetical grievances to misuse the legal system to extract considerable sums from commercial speakers undermines this delicate balance. The UCL, as construed by the trial court, allows an action to be maintained on behalf of class members who – for lack of injury, loss, or proximate causation – could not otherwise maintain an individual action in their own names. So construed, the UCL violates the First Amendment and the California Constitution by upsetting the balance between the competing interests of free speech and the regulation of false and misleading speech, and thereby chilling the speech of California advertisers. Furthermore, because California advertisers are typically national advertisers, the trial court's constitutionally infirm construction of the UCL also places an unconstitutional burden on interstate commerce.

The decision below ignores the clear mandate of Proposition 64 and runs roughshod over free expression rights of commercial speakers such as

Pfizer Inc. Accordingly, this Court should reverse the trial court's decision and rescind the certification of plaintiff's class action.

I. The UCL, As Amended By Proposition 64, Requires That All Class Members Meet The Requirements Of Injury, Loss, And Proximate Causation

A. The UCL Did Not Require Private Plaintiffs To Satisfy Traditional Standing Requirements Before The Adoption Of Proposition 64.

Before California voters approved Proposition 64, the UCL authorized "any person" to sue on behalf of the general public for false advertising without satisfying any standing requirement; the statute did not require a private plaintiff to have suffered injury-in-fact (*see* Bus. & Prof. Code, § 17204), nor did it require a private plaintiff to prove actual deception, reliance, or damage. (*See, e.g., Committee on Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 211 [197 Cal.Rptr. 783, 673 P.2d 660] ["Allegations of actual deception, reasonable reliance and damage are unnecessary."].) Moreover, a person who suffered no injury could file an action in a representative capacity without satisfying the normal requirements for class certification. (*See, e.g., Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561 [71 Cal.Rptr.2d 731, 950 P.2d 1086].)

At least five justices of the United States Supreme Court, prompted by the arguments of the Solicitor General, questioned the constitutionality of these principles in *Nike, Inc. v. Kasky* (2003) 539 U.S. 654. Justice

Stevens' opinion concurring in the dismissal of the case (joined by Justices Ginsburg and Souter) highlighted the lack of a standing requirement in the UCL. (*Id.* at p. 661 (Stevens, J.).) Moreover, Justice Stevens emphasized the "novelty and importance of the constitutional questions presented" by the UCL. (*Id.* at p. 663.) Justice Breyer's opinion (joined by Justice O'Connor) repeatedly noted the lack of an injury requirement and highlighted the anomalous nature of the UCL. (*See id.* at p. 668 [recognizing Kasky's "standing problems"] [Breyer, J., dissenting from the order dismissing the writ of certiorari as improvidently granted]; *see also id.* at p. 678 [explaining that § 17204 authorizes suits by "private attorneys general" who "have suffered no harm" making it "unlike most traditional false advertising regulation"]; *id.* at p. 679 [explaining that "a private 'false advertising' action brought on behalf of the State, by one who has suffered no injury, threatens to impose a serious burden upon speech"].) Moreover, Justice Breyer opined that the UCL likely violated the First Amendment. (*Id.* at p. 679 ["I doubt that this particular instance of regulation . . . can survive heightened scrutiny."]; *see also id.* at p. 681.)

B. Proposition 64 Amended The UCL By Firmly Rooting The Law In Traditional Standing Requirements.

In 2004, the voters of California approved Proposition 64 to remedy the fundamental defects of the existing UCL. As the "Findings and Declarations of Purpose" make clear:

> The[ ] unfair competition laws [set forth in Section 17200 and 17500] are being misused by some private attorneys who:
>
> (1) File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit.
>
> (2) File lawsuits where no client has been injured in fact.
>
> (3) File lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant.
>
> (4) File lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.

(Proposition 64, § 1(b).)

To remedy these abuses, Proposition 64 amended the UCL to provide that an "action[ ] for any relief" may be prosecuted by a private person only if that person "has suffered injury in fact and has lost money or property as a result of such unfair competition." (Bus. & Prof. Code, § 17204 [as amended by Proposition 64].) Consistent with this amendment, Proposition 64 revised Sections 17203 and 17535 to provide that "[a] person 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 California Code of Civil Procedure . . . ." (*Id.* § 17203 [as amended by Proposition 64].)[1]

As the *amici curiae* brief of the California Chamber of Commerce *et al.* cogently explains, reading the foregoing provisions *in pari materia*, it is abundantly clear that a class action plaintiff cannot rely on CCP Section 382 to make an end-run around the injury-in-fact requirement imposed on Section 17204 by Proposition 64. (*See, e.g., Fidelity Creditor Service, Inc. v. Browne* (2001) 89 Cal.App.4th 195, 200 [106 Cal.Rptr.2d 854] ["We must construe similar statutes, *i.e.*, those *in pari materia*, to 'achieve a uniform and consistent legislative purpose.'"] [quoting *Isobe v. Unemp. Ins. Appeals Bd.* (1974) 12 Cal.3d 584, 590-91 (116 Cal.Rptr. 376, 526 P.2d 528)]; *City of Huntington Beach v. Bd. of Administration of Public Employees' Retirement System* (1992) 4 Cal.4th 462, 468 [14 Cal.Rptr.2d 514, 841 P.2d 1034] ["[A]ll parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others."].)

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[1] (*See also Day v. City of Fontana* (2001) 25 Cal.4th 268, 274 [105 Cal.Rptr.2d 457, 19 P.3d 1196] [explaining that the court would take into account the proposition's "Findings and Declaration of Purpose" because it bore "directly on the issue of legislative intent"]; *People v. Montes* (2003) 31 Cal.4th 350, 360 [2 Cal.Rptr.3d 621, 73 P.3d 489] [same]; *Jenkins v. County of Los Angeles* (1999) 74 Cal.App.4th 524, 531 [88 Cal.Rptr.2d 149] ["We may consider the voter pamphlet in determining the intent of the electorate."].)

Proposition 64 unequivocally states that the measure was intended, in part, to prohibit attorneys from "[f]il[ing] lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant" or "on behalf of the general public without any accountability to the public and without adequate court supervision." (Proposition 64 § 1(b)(3), (4).) Against this backdrop, to read the statute to permit the certification of class actions in the absence of any threshold showing that all of the putative class members "ha[ve] suffered injury in fact and . . . lost money or property as a result of [the alleged] unfair competition" would render Proposition 64 a dead letter. (*See id.*, § 1(f) ["It is the intent of California voters in enacting this act that *only the California Attorney General and local public officials* be authorized to file and prosecute actions on behalf of the general public."] [italics added].)

C. The Trial Court's Decision Eviscerates The Clear Mandate Of Proposition 64.

By interpreting the UCL so as to permit a private plaintiff to maintain a representative action on behalf of the general public based solely on a demonstration that the would-be representative alone suffered qualifying injury, the trial court's decision turns Proposition 64 on its head. Noting that "whether the standing requirements for class members . . . changed under the UCL is an open issue" (*Galfano v. Pfizer, Inc.* (Nov. 23,

2005, BC327114) __ Cal.4th __ [p. 7]), the court expressed "reservations concerning the remedies available to the class" and acknowledged that "*the requirements of 'injury in fact' or 'lost money or property as a result' of the conduct of Defendant Pfizer, as imposed by Proposition 64, may preclude recovery on a class basis.*" (*Id.* at p. 12 [italics added].) Nevertheless, the trial court eviscerated the clear mandate of Proposition 64 by certifying the class in the absence of any meaningful, threshold showing that any other class member "suffered injury in fact and . . . lost money or property as a result of . . . unfair competition." (Bus. & Prof. Code, § 17204 [as amended by Proposition 64].)

The trial court's "cart before the horse" class certification ruling – which confuses the pre-trial standing requirement with the post-trial damages inquiry – ignores the plain language of the UCL as amended and is plainly contrary to California law. (*See, e.g., Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73 [231 Cal.Rptr. 638] ["Each class member must have standing to bring the suit in his own right."] [quotation omitted]; *see also Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 716 [125 Cal.Rptr. 147] [explaining that a class action is "merely a procedural device for consolidating" separate actions of many individuals that otherwise would have to be "individually litigate[d]"].) California courts have often reiterated that "[c]lass actions are provided only as a means to enforce substantive law." (*City of San Jose v. The Superior Court*

of Santa Clara (1974) 12 Cal.3d 447, 462 [115 Cal.Rptr. 797, 525 P.2d 701].) Hence, "[a]ltering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going." (*Ibid.*; *see also Feitelberg v. Credit Suisse First Boston LLC* (2005) 134 Cal.App.4th 997, 1020 [36 Cal.Rptr.3d 592] ["The tail does not wag the dog."].)

Furthermore, that recovery on a class basis ultimately may be precluded provides cold comfort to a defendant in Pfizer's position because, contrary to the letter and purpose of Proposition 64, Pfizer is left to grapple with the *in terrorem* effects of "conditional certification" and a sharply tilted playing field in the meantime. An improperly certified class is not a trivial procedural error, because certification places significant financial pressure on defendants that is completely divorced from the merits of the underlying claims. "It is the decisive point in a class action. Following certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs, of litigating a class action . . . ." (Hoffman, Remarks, *Panel 7: Class Actions As An Alternative To Regulation: The Unique Challenges Presented By Multiple Enforcers And Follow-On Lawsuits* (2005) 18 Geo. J. Legal Ethics 1311, 1329 [statement of Bruce Hoffman, Deputy Director of FTC's Bureau of Competition].)

This is true even where, as here, the merits of the class action claims are highly dubious. As Judge Posner has explained, certification leaves defendants with a Hobson's choice; defendants are left "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle *even if they have no legal liability.*" (*In re Rhone-Poulenc Rorer, Inc.* (7th Cir. 1995) 51 F.3d 1293, 1299 [italics added].) In California – a state with a current population of approximately 36 million – a class comprised of hypothetically injured citizen-claimants is potentially staggering in scope. Thus, the U.S. House Judiciary Committee has recognized that certification, even in a frivolous case, can force a defendant to settle: "[T]he perverse result [is] that companies that have committed no wrong find it necessary to pay ransom to plaintiffs' lawyers because the risk of attempting to vindicate their rights through trial simply cannot be justified to their shareholders. Too frequently, corporate decisionmakers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars of damages." (H.R. Rep. No. 106-320, p. 8 (1999) [quotation omitted]).

Accordingly, on these grounds alone, the trial court's class certification decision should be reversed.

II. The Trial Court's Construction Of The UCL, As Amended By Proposition 64, Violates The First Amendment And The Free Speech Clause of the California Constitution.

Both the First Amendment and the Free Speech Clause of the California Constitution ensure that government will not unduly interfere with the marketplace of ideas. (*See, e.g., Red Lion Broadcasting Co. v. FCC* (1969) 395 U.S. 367, 390 ["It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."].) Thus, the guarantee of free speech, above all else, ensures that "[g]overnment [will] not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 255.) As the Supreme Court has explained, "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 612.)[2]

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[2] An interpretation of the amended UCL that violates the First Amendment to the United States Constitution would likewise violate the Free Speech Clause of the California Constitution. (*See* Cal. Const., art. I, § 2 ["Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."]; *see also*

The right of free speech extends to the commercial marketplace: "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. *But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.*" (*Edenfield v. Fane* (1993) 507 U.S. 761, 767 [italics added];[3] *see also Zauderer v. Off. of Disciplinary Counsel of the Supreme Ct. of Ohio* (1985) 471 U.S. 626, 646 ["Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false,

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Gerawan Farming, Inc. v. Lyons (2000) 24 Cal.4th 468, 490 [101 Cal.Rptr.2d 470, 12 P.3d 720] ["Article I's free speech clause is at least as broad as the First Amendment's, and its right to freedom of speech is at least as great."]; *L.A. Alliance For Survival v. City of Los Angeles* (9th Cir. 1998) 157 F.3d 1162, 1165 ["California's Liberty of Speech Clause provides greater protection for expressive activity than does the First Amendment . . . ."].)

[3] As the Supreme Court has observed, "[o]f course, we were not the first to recognize the value of commercial speech: '[Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.'" (*City of Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 421 [quoting Boorstin, The Americans: The Colonial Experience (1958) pp. 328, 415 [quoting Thomas, History of Printing in America with a Biography of Printers, and an Account of Newspapers (2d ed. 1810)]].)

the helpful from the misleading, and the harmless from the harmful."]; *Pacific Frontier v. Pleasant Grove City* (10th Cir. 2005) 414 F.3d 1221, 1236 ["Commercial speech merits First Amendment protection not simply because it enables sellers to hawk their wares and gain a profit, but because it equips consumers with valuable information and because it contributes to the efficiency of a market economy."] [citing *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 364].) Accordingly, government regulation of commercial speech must not unduly constrain the ability of advertisers to reach the public. (*See, e.g., Edenfield v. Fane*, *supra*, 507 U.S. at p. 766-67.)

Traditional common law suits by private actors generally do not offend the First Amendment and its California counterpart because they are bounded by falsity and injury requirements that limit constitutional concerns. Thus, private plaintiffs who seek remedies for misrepresentation must demonstrate that they reasonably relied on the false statements and suffered actual injury as a result. (*See* Rest.2d Torts, § 525 (1999); Pridgen, Consumer Protection and the Law (2006 ed.) § 2.2, pp. 16-18.) The injury-in-fact and economic loss requirements incorporated in Proposition 64 similarly shield protected speech by limiting gratuitous challenges by private actors and act as safeguards to ensure that liability is imposed only in those cases that serve the government's interests in preventing fraud and restoring injured parties to the ex ante status quo.

(*See, e.g., Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 348-49 [recognizing the "legitimate state interest in compensating private individuals for wrongful injury to reputation," but cautioning that this "interest extends no further than compensation for actual injury"]; *cf. N.Y. Times Co. v. Sullivan* (1964) 376 U.S. 254, 277 [emphasizing the need for safeguards to protect free speech because Alabama's defamation law imposes liability "without the need for any proof of actual pecuniary loss"].)

The requirements of reliance and actual injury ensure that private suits do not overdeter speakers and chill constitutionally protected speech. In other words, these requirements serve to maintain the delicate balance between the competing interests inherent in protecting free expression and policing the integrity of commercial transactions. (*See Gertz v. Robert Welch, Inc., supra*, 418 U.S. at p. 342 [recognizing that "tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury"].)

The Supreme Court has recognized that because "erroneous statement[s] of fact" are "inevitable" in the realm of debate "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." (*See Gertz v. Robert Welch, Inc., supra*, 418 U.S. at p. 340.) That is, "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement,

even fear of the expense involved in their defense," tends to make speakers censor their own speech. (*Time, Inc. v. Hill* (1967) 385 U.S. 374.) This fear of excessive judgments for erroneous statements of fact produces a climate where speakers "tend to make only statements which steer far wider of the unlawful zone." (*N.Y. Times Co. v. Sullivan* (1964) 376 U.S. 254, 279 [quotation omitted].) Cognizant of this natural tendency of speakers to self-censor in order to avoid liability for their speech, the Supreme Court has been especially careful to ensure that state remedies for unprotected speech "reach no farther than is necessary to protect the legitimate interest involved." (*See Gertz v. Robert Welch, Inc., supra*, 418 U.S. at p. 349; *id.* at p. 340 [warning that overly stringent liability for false or misleading speech may lead to "intolerable self-censorship"].)

Thus, for example, the Supreme Court has protected even false speech in order to prevent the chilling of protected speech. (*N.Y. Times Co. v. Sullivan, supra*, 376 U.S. at p. 279.) In *N.Y. Times Co. v. Sullivan*, the Supreme Court was concerned that over-regulation of defamatory statements would chill protected speech, "even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." (*Ibid.*) Accordingly, the Court set out "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official

conduct unless he proves that the statement was made with 'actual malice.'" (*Id.* at pp. 279-80.)

These same principles apply in the marketplace. (*See Nike, Inc. v. Kasky, supra*, 539 U.S. at p. 682 [discussing *Gertz* and *Time* and recognizing that the pre-Proposition 64 UCL might chill the speech of "commercial speakers doing business in California . . . because they fear potential lawsuits and legal liability"].) Because "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press," the "First Amendment requires that we protect some falsehood in order to protect speech that matters." (*Gertz v. Robert Welch, Inc., supra*, 418 U.S. at p. 340-41.) As James Madison explained, "[s]ome degree of abuse is inseparable from the proper use of every thing." (4 Elliot, Debates on the Federal Constitution of 1787 (1876) p. 571.) Thus, "[i]n our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." (*See Gertz v. Robert Welch, Inc., supra*, 418 U.S. at p. 342 [quoting *NAACP v. Button* (1963) 371 U.S. 415, 433].)

Regulatory regimes that do not appropriately limit private actors who seek to use representative actions to sanction allegedly untruthful or misleading speech for their own advantage upset this delicate balance.

Justice Breyer emphasized this point in the *Nike* case when he opined that the pre-Proposition 64 UCL suffered from precisely this type of defect: "[T]here is no reasonable 'fit' between the burden [the UCL] imposes upon speech and the important governmental 'interest served.'" (*See Nike, Inc. v. Kasky, supra*, 539 U.S. at p. 679 [Breyer, J.] [quoting *Bd. Of Trustees of State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 480].) Where speech is over-regulated, "potential speakers, out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand. That is what a 'chilling effect' means." (*Id.* at p. 683 [Breyer, J.] [citing *Time* and *Gertz*]; *see also id.* at p. 682 [Breyer, J.] [noting that the pre-Proposition 64 UCL deterred Nike from engaging in speech]; *id.* at pp. 682-83 [Breyer, J.] ["Numerous *amici*—including some who do not believe that Nike has fully and accurately explained its labor practices—argue that California's decision will 'chill' speech"]; *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at pp. 348-49 [recognizing the "legitimate state interest in compensating private individuals for wrongful injury to reputation," but cautioning that this "interest extends no further than compensation for actual injury"].)

Here, the trial court's erroneous construction of the UCL – which allows a private actor to maintain a representative action on behalf of persons who lack standing to maintain individual actions in their own right – likewise violates the First Amendment by upsetting the balance between

the competing interests of protecting free speech and policing commercial transactions. Under *Gertz*, the State's interest in providing private remedies "extends no further than compensation for actual injury" and cannot support a class action on behalf of those who, standing in their own shoes, could not otherwise properly maintain an action. (418 U.S. at p. 349.)[4]

Moreover, the trial court's construction of the amended UCL improperly interferes with interstate commerce. Many California advertisers are national advertisers that distribute their messages in media that travel widely in interstate commerce and know no state boundaries. As construed by the trial court, the UCL over-regulates commercial speakers in California and unduly projects into the national sphere, interfering with speech outside of California and raising serious Commerce Clause concerns. (*Healy v. Beer Inst., Inc.* (1989) 491 U.S. 324, 336-37

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[4] To be sure, this case appears a bit different from the *Nike* case. In *Nike*, the plaintiff alleged no injury; nor was he required to do so under the then-current version of the UCL. Here, the lead plaintiff has alleged injury. However, this distinguishing factor does not undermine the free speech analysis because the issue is not whether Mr. Galfano has standing to sue in his own name, but whether Mr. Galfano should be allowed to sue on behalf of class members who have not been shown to have suffered any injury. Here, as in *Nike*, the UCL has been deemed to authorize suit by enforcers who have suffered no injury, improperly subjugating commercial speakers' free expression rights to the State's interest in policing the integrity of commercial transactions. The State's interest cannot extend this far. As Justice Breyer explained, in the absence of a meaningful injury-in-fact requirement, the UCL imposes too great a burden on speech relative to the governmental interest served. (*See Nike, Inc. v. Kasky, supra*, 539 U.S. at p. 679 [Breyer, J.].

["Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."]; *see also id.* at 336 ["[A] statute [or judicial interpretation of state law] that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."]; *General Motors Corp. v. Tracy* (1997) 519 U.S. 278, 287 [explaining that the Commerce Clause "prohibits state . . . regulation . . . that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace"] [citations and quotations omitted].) As the Supreme Court long ago explained, it is "impossible to permit the statutes of [a State] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." (*New York Life Ins. Co. v. Head* (1914) 234 U.S. 149, 161.)

This Court should therefore reverse the trial court's order approving the plaintiff's class on the grounds that it rests upon a construction of the

UCL that violates the First Amendment and the Free Speech Clause of the California Constitution.[5]

CONCLUSION

The trial court's erroneous construction of the amended UCL completely undermines Proposition 64 contrary to its plain language and remedial purpose. In addition, the trial court's erroneous interpretation obliterates the constitutional safeguards erected by Proposition 64 and threatens to chill valuable speech in violation of the First Amendment to the

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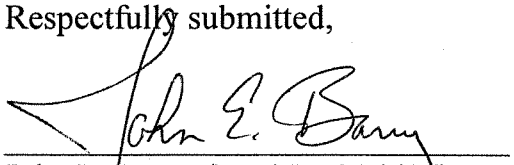
[5] At a minimum, the court should adopt Pfizer's interpretation of Proposition 64 to avoid the difficult constitutional questions that would otherwise be presented. (*See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Construction Trades Council* (1988) 485 U.S. 568, 575 ["[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems."]; *People v. Amor* (1974) 12 Cal.3d 20, 30 [114 Cal. Rptr. 765, 523 P.2d 1173] ["It is settled that statutes are to be so construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional and that California courts must adopt an interpretation of a statutory provision which, consistent with the statutory language and purpose, eliminates doubt as to the provision's constitutionality."] [internal quotations and citations omitted].)

United States Constitution and the Free Speech Clause of the California Constitution. Accordingly, this Court should reverse the decision below.

Dated: April 19, 2006

Respectfully submitted,



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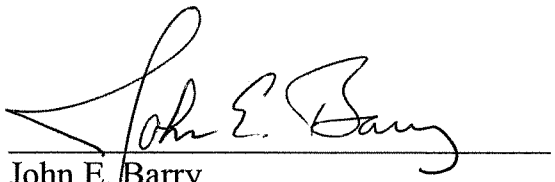
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the attached brief complies with the form, size and length requirements of Cal. R. App. Pro. 14(b) and (c) because it was prepared in a proportionally spaced type using Word 10 in Times Roman 13-point font double spaced and contains 5480 words, excluding the portions of the brief exempted by Cal. R. App. Pro. 14(c).



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 2006 I caused an original and four copies of the foregoing brief to be filed via prepaid UPS Overnight Service with the clerk of the Court of Appeals. I also caused to be mailed via prepaid UPS Overnight Service five copies to the Clerk of the Supreme Court and one copy to the Clerk of the Superior Court, Los Angeles County, in compliance with Cal. R. App. Pro. 40.1(a) and Cal. R. App. Pro. 44(b)(2), as well as one copy to each of the following recipients:

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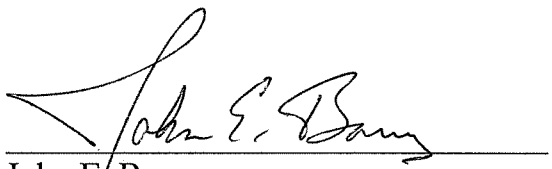

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