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September 14, 2006

BY OVERNIGHT DELIVERY

Honorable Ronald M. George
Chief Justice of California
Honorable Associate Justices
of the Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-7303

Re: ***Pfizer, Inc. v. Superior Court***
Supreme Court Case No. S145775

Dear Chief Justice George and Associate Justices:

Public Citizen, Inc., and the Center for Auto Safety submit this letter pursuant to California Rule of Court 28(g) in support of the petition for review of the Court of Appeal's decision in *Pfizer, Inc. v. Superior Court of Los Angeles County (Galfano),* Case No. B188106 (2006).

I. THE APPLICANTS' INTEREST

Public Citizen is a national, nonprofit consumer advocacy organization that was founded in 1971 to represent the interests of consumers in Congress, the executive branch, and the courts. For over 30 years, Public Citizen has fought for the right of consumers to seek redress in the courts; for safe, effective, and affordable prescription drugs and health care; and for strong health, safety and environmental protections. Public Citizen has more than 16,000 members in California alone.

The Center for Auto Safety (CAS) is also a national, nonprofit consumer advocacy organization, which consumer advocate Ralph Nader and the Consumers Union founded in 1970. It is a member of the Consumer Federation of America, and is dedicated to, *inter alia,* promoting motor vehicle safety, ensuring that defective and unsafe vehicles and automotive equipment are removed from the road, and to improving the quality and reducing the cost of automotive repairs. CAS's members reside in California and throughout the United States.

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The *Pfizer* decision raises grave concerns for Public Citizen, CAS, and their members in California. It erroneously (and paradoxically) requires a showing of actual reliance and damages (*i.e.,* a loss of money or property) by each and every person whose rights under the Unfair Competition Law (UCL), Bus. & Prof. Code §§ 17200-17209, are alleged to have been violated – even though the UCL has been construed as not permitting an award of damages. As the voter materials pertaining to Proposition 64 demonstrate, this was not what the electorate believed it was voting for when it approved that ballot initiative. If the *Pfizer* decision is allowed to stand, one of the most powerful and effective consumer-protection statutes in the nation will be nullified in many, perhaps most, cases. Accordingly, we respectfully request that the Court grant the petition for review.

II. THE REASONS THIS COURT SHOULD GRANT REVIEW

Proposition 64 was promoted to the electorate as a way to prevent the prosecution of frivolous UCL actions by eliminating the private-attorney-general standing provision (and requiring compliance with Code of Civil Procedure section 382) and by requiring a showing that the alleged UCL violation caused the plaintiff to suffer a loss of money or property. *See* Official Voter Information Guide: California General Election November 2004, at 109 (2004) (hereinafter, *Voter Guide*). Equally important, however, the voter materials also made clear that existing substantive rights and remedies under the UCL would not be diminished. For example, the Findings and Declaration of Purpose stated that [i]t is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to [the UCL]. *Id.* § 1(d).

Soon after Proposition 64 became law, however, its proponents began to argue that the initiative went far beyond standing, because losing money or property as a result of a UCL violation had to mean that each victim of fraud must prove individual reliance, thus sweeping away decades of jurisprudence and making it exceedingly difficult – if not impossible – to exercise rights even in a wholly valid UCL action. *See, e.g.,* Andrew B. Serwin and Russell L. Carlberg, *Is UCL Fraud Now Akin to Common Law Fraud? Reliance, Materiality and Causation After Proposition* 64, 14 COMPETITION 45 (2005) (hereinafter, *UCL Fraud*). The principal argument was that, because the UCL now provides that plaintiffs must show they lost money or property ***as a result of*** . . . unfair competition[,] plaintiffs must plead and prove causation to prevail on a UCL claim. *Id.* at 47 (quoting Bus. & Prof. Code § 17203) (emphasis added).

More specifically, the proponents of this approach argued that stating a claim under the fraud prong of the UCL not only requires the plaintiff to show a causal link to the fraudulent transaction, it requires the plaintiff to show actual reliance on the fraudulent conduct as the but-for cause of the plaintiff's loss, and to do so on behalf of each member of the proposed class. *UCL Fraud,* 14 Competition at 45-47. Thus, pursuing a claim under the fraud prong of the UCL would be virtually identical to pursuing a claim for common-law fraud – one of the most difficult claims to plead and prove – but without the ability to recover damages, even though the plaintiff must

establish a loss of money or property (*i.e.*, damages) to have standing to prosecute a UCL claim.

The principal problem with this argument is that it ignores the fact that the UCL, like the FTC Act and virtually all other states‘ unfair and deceptive acts and practices statutes, was intended to override the common law's impediments to effective consumer protection. The most serious of these common-law impediments is proof of reliance, which the Legislature did away with when it enacted the UCL. *E.g., Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 209 (1983). Under the circumstances, it is unfathomable that Proposition 64 should be read to ***silently*** override that very basic premise of the UCL.

Yet this is the argument that Pfizer has made, and the Court of Appeal adopted it. *See Pfizer,* 141 Cal. App. 4th at 303-07. Implicit in the Court of Appeal‘s ruling is a finding that Proposition 64 was not merely a ***procedural*** check on frivolous UCL actions, but was a fundamental revision of the UCL that did away with decades of UCL jurisprudence. As this Court has explained, however, Proposition 64 left entirely unchanged the substantive rules governing business and competitive conduct. 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. *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223, 232 (2006). In other words, the very reason this Court deemed Proposition 64 to be retroactive was that it had ***no*** effect on the substantive claims or defenses that could be made under the UCL. *Id.* As such, it is simply not possible to reconcile this Court‘s ruling in *Mervyn's* with the Court of Appeal‘s ruling in *Pfizer*.

But it is not only an irreconcilable conflict with *Mervyn's* that illustrates why the *Pfizer* decision is erroneous. The *Pfizer* court‘s rationale also conflicts with what the electorate was told when Proposition 64 was put on the ballot. As the *Pfizer* court recognized, the application of Proposition 64‘s amendments must comport with voter intent. 141 Cal. App. 4th at 306. *See also Robert L v. Superior Court*, 30 Cal. 4th 894, 901 (2003) (in the event of an ambiguity, courts must refer to other indicia of the voters‘ intent, particularly the analyses and arguments contained in the official ballot pamphlet. . . . Our task is simply to interpret and apply the initiative‘s language so as to effectuate the electorate‘s intent) (citation and inner quotation marks omitted). *Id.* at 900-01.

The *Pfizer* decision may make sense as a matter of abstract philology, but it simply does not comport with what voters were told before they voted on Proposition 64. Voter-information materials and advertising that ran for several months before the election described Proposition 64 as a remedy for a bleak and patently unfair situation: Lawyers were forming fake consumer watchdog entities to serve as private attorneys general under the UCL‘s broad standing provisions, which permitted them to prosecute frivolous UCL claims on behalf of others without the need for class certification, and without regard to whether the plaintiff was actually involved in the events underlying the lawsuit. And because small businesses that could not afford to hire their own lawyers

were the targets of these suits, they were forced into settlements that bore a strong resemblance to extortion.

Supporters of Proposition 64 argued that the proposed amendments to the UCL were needed to prevent small businesses from becoming the victims of frivolous lawsuits that were clogging the courts as a result of the UCL's broad standing provisions. *Voter Guide* at 40. Proposition 64's backers stated that the initiative would put an end to these shakedown lawsuits against small businesses while preserving the right to prosecute legitimate claims under the UCL. *Id.*

The portion of the *Voter Guide* containing the text of the initiative itself was even more specific. In the preamble titled Findings and Declaration of Purpose, the authors of Proposition 64 proclaimed that the UCL was being misused by some private attorneys who . . . (1) [f]ile frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit[;] (2) [f]ile lawsuits where no client has been injured in fact[;] (3) [f]ile 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[; and] (4) [f]ile lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision[;] . . . *Id.* at 109 § 1(b).

Another finding was that [f]rivolous unfair competition lawsuits clog our courts and cost taxpayers. *Id.* at § 1(c). But the preamble also declares that [i]t is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits ***while protecting the right of individuals to retain an attorney and file an action for relief*** pursuant to [the UCL] *Id.* § 1(d) (emphasis added). In short, the stated objectives of Proposition 64, as set forth in the Findings and Declaration of Purpose, were to prevent the prosecution of ***frivolous*** UCL actions by requiring that the person who brings a UCL claim to have suffered a loss of money or property as a result of a UCL violation, and by eliminating the ability of private plaintiffs to prosecute UCL actions as private attorneys general, while preserving the right to prosecute ***valid*** UCL actions on behalf of others by complying with Code of Civil Procedure section 382. *See generally id.* at § 1(a)-(h).

In short, ***nothing*** in the materials that were presented to the electorate support the notion that Proposition 64 was intended to create new requirements that are so onerous that they would impede, if not completely destroy, the ability to prosecute representative claims under the fraud prong of the UCL. To the contrary, because the stated purpose of the amendments to the UCL's standing provisions was to ensure that the plaintiff has a personal stake in the litigation while preserving the right to bring valid UCL actions, the only reasonable construction of the language of those amendments – Actions for relief pursuant to this chapter shall be prosecuted in a court of competent jurisdiction by . . . any person who has suffered injury in fact and has suffered a loss of money or property as a result of such unfair competition – is that the plaintiff must show that the loss was causally related to the UCL violation.

This approach is not only consistent with the way Proposition 64 was pitched to voters, it is consistent with the approach courts have used when construing nearly identical language in the Consumers Legal Remedies Act (CLRA), Civ. Code §§ 1750-1784. Like the UCL, the CLRA contains language that limits recovery to plaintiffs who suffer damage as a result of a violation of that statute. *See* Civ. Code § 1780(a) (Any consumer who suffers any damage ***as a result of*** the use or employment by any person of a method, act or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain [damages and other forms of relief]) (emphasis added).

As the Court of Appeal has explained, this provision does ***not*** amount to a requirement that the plaintiff show actual reliance, much less doom the possibility of prosecuting claims in the context of a class action:

> [R]elief under the CLRA is limited to [a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice unlawful under the act. As Mass Mutual argues, this limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm.
>
> Contrary to Mass Mutual's contention, the causation required by Civil Code section 1780 does not make the plaintiffs' claims unsuitable for class treatment. 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. Thus, it 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.

Massachusetts Mutual Life Ins. Co. v. Superior Court, 97 Cal. App. 4th 1282, 1292-93 (2002) (citations, brackets, and internal quotation marks omitted; emphasis in original).

Under this approach, there would be no difficulty with proceeding as a class action in the vast majority of UCL cases, without doing violence to the substantive provisions of the UCL itself or decades of jurisprudence construing and applying it. Indeed, as one court recently explained, requiring a showing of actual reliance would not only subvert the basic objectives of the UCL, it would have the effect of providing immunity to liability under the UCL, even in the clearest cases of fraudulent conduct:

> One common form of UCL or FAL claim is a short weight or short count claim. For example, a box of cookies may indicate that it weighs

> sixteen ounces and contains twenty-four cookies, but actually be short. Even in this day of increased consumer awareness, not every consumer reads every label. If actual reliance were required, a consumer who did not read the label and rely on the count and weight representations would be barred from proceeding under the UCL or the FAL because he or she could not claim reliance on the representation in making his or her purchase. Yet the consumer would be harmed as a result of the falsity of the representation.

Anunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1135 (N.D. Cal. 2005).

But the *Pfizer* court declined to adopt this approach. It found that although the court in *Anunziato* had expressed an understandable concern, it would appear the court substituted its judgment for that of the voters and based its decision on the perceived ill effects a reliance' requirement would have in hypothetical fact situations. *Pfizer,* 141 Cal. App. 4th at 306.

As the voter materials reveal, however, it was the *Pfizer* court that substituted its judgment for that of the voters. Once again, nothing in the voter information materials or the advertising regarding Proposition 64 even hinted that the amendments would make it more difficult to prosecute valid UCL claims. To the contrary, the importance of the UCL as a weapon against unlawful, unfair, and fraudulent business practices was expressly reaffirmed, and voters were told that Proposition 64 would ***preserve*** the ability to prosecute legitimate claims, and that the purpose of the amendments was simply to weed out the frivolous and abusive lawsuits that should never have been filed in the first place.

Stated differently, voters were not told that the UCL made it too easy to establish liability for widespread unlawful, unfair, or fraudulent business practices; they were told that unscrupulous lawyers were taking advantage of a few procedural loopholes in the UCL, which Proposition 64 would close so that specious claims could be separated from legitimate ones. As such, the message that went to voters was that Proposition 64's amendments were to serve a gate-keeping function – to screen frivolous claims by ensuring that the person bringing the action had suffered demonstrable harm, and to ensure that any representative action be subject to judicial oversight by requiring compliance with Code of Civil Procedure section 382.[1]

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[1] In *Pfizer,* the Court of Appeal repeatedly refers to Proposition 64 as requiring private representative actions to satisfy the procedural requirements applicable to class action lawsuits .... 141 Cal. App. 4th at 303. Actually, however, Proposition 64 says that a representative action may be brought under the UCL only if it complies with Section 382 of the Code of Civil Procedure .... Bus.& Prof. Code § 17203. The distinction is important because of the strict and literal construction the *Pfizer* court applied to the as a result of language added to Section 17204. That is, although the court states that it is bound to apply a strict and literal construction of the as a result of language, regardless of the impact such a construction will have on the substantive provisions of the UCL, the court did not even consider applying the same construction to the language pertaining to compliance with Section 382.

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Reading an actual-reliance element into the UCL would also strike at the heart of the legislative purpose that has informed the UCL since it was codified at California Civil Code section 3369 over seven decades ago:

> The language of section 3369 . . . explicitly extends to any unlawful, unfair *or* deceptive business practice ; the Legislature, in our view, intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, although ***most precedents under section 3369 have arisen in a "deceptive" practice framework***, even these decisions have frequently noted that ***the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innum1erable ",new schemes which the fertility of man s invention would contrive***.' (*American Philatelic So. v. Claibourne* (1935) 3 Cal.2d 689, 698 [46 P.2d 135].) As the *Claibourne* court observed: When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. ***There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem***.

Barquis v. Merchants Collection Ass'n, 7 Cal. 3d 94, 111-12 (1972) (footnote omitted; initial emphasis in original, latter emphasis added).

This original, and accurate, understanding of the Legislative purpose has not changed over the years. Quite the contrary, this has repeatedly reaffirmed the UCL's broad sweep. *E.g., Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 560 (1998) (same); *Bank of the West v. Superior Court,* 2 Cal. 4th 1254, 1266 (1992) (same); *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 209 (1983) (same); *People v. McKale*, 25 Cal. 3d 626, 632 (1979) (same). And

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If it had, the court would have found that Proposition 64 does ***not*** require private representative actions to satisfy the procedural requirements applicable to class action lawsuits. Rather, it requires compliance ***with Section 382***, which does not contain detailed procedural criteria, as do Federal Rule of Civil Procedure 23 and Civil Code section 1782; Section 382 merely states that when the question is one of a common or general interest, of many persons, ***or*** when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. (Emphasis added.)

The point is that the only way that Proposition 64 could impose the procedural requirements applicable to class action lawsuits is by liberally construing its language to include the body of case law that created the procedural requirements that cannot be found in Section 382 itself. And if the *Pfizer* court had applied the same standard to the as a result of language, it would have had to read that language in the light of case law that has informed the application of the UCL for the past 70 years.

whenever the Legislature has acted to amend the UCL, it has done so only to expand its scope, never to narrow it. *Stop Youth Addiction*, 17 Cal. 4th at 570.

Under the circumstances, it would take far more than an amendment of the UCL's standing provisions to transform it from one of the most powerful unfair-business-practice statutes in the nation into what amounts to a toothless common-law fraud claim. That, however, is precisely what the Court of Appeal has done with its decision in *Pfizer*.

Accordingly, *amici* respectfully submit that the petition for review be granted, and that this Court should overrule the Court of Appeal's decision in *Pfizer*.

Very truly yours,

Jeffrey L. Fazio

cc: Christine Choi (counsel for Petitioner)
Jeffrey S. Gordon (counsel for Respondent)