No. S171845

IN THE
SUPREME COURT OF CALIFORNIA



KWIKSET CORPORATION et al.,
*Petitioners,*

vs.

THE SUPERIOR COURT OF ORANGE COUNTY,
*Respondent,*

JAMES BENSON et al.,
*Real Parties in Interest.*

Fourth Appellate District, Division Three, No. G040675
Orange County Superior Court No. 00CC01275
The Honorable David C. Velasquez

# OPENING BRIEF ON THE MERITS OF REAL PARTIES IN INTEREST

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## QUESTIONS PRESENTED

The issues presented, as stated in the petition for review, are as follows:

1. What is the meaning of "injury in fact" and "lost money or property as a result of" unfair competition or false advertising, as used in the Unfair Competition Law (Bus. & Prof. Code, § 17204) (UCL) and the False Advertising Law (Bus. & Prof. Code, § 17535) (FAL), as amended by Proposition 64?

2. Are the new standing requirements satisfied in a false advertising case where plaintiffs allege that as a result of defendants' material misrepresentations, plaintiffs spent money and received a product they did not want or, as the Court of Appeal held, must plaintiffs also allege that the product was "defective, or not worth the purchase price they paid, or cost more than similar products" not falsely represented? (*Kwikset Corp. v. Superior Court* (2009) 171 Cal.App.4th 645, 654, superseded by grant of review (*Kwikset Corp.*).)

3. Should plaintiffs be allowed to amend their complaint following the reversal of the trial court's order overruling defendants' demurrer, in order to conform their complaint to the appellate court's newly-articulated legal standard, where they demonstrated that the trial court record contains facts sufficient to meet that standard?

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

In its recent decision in *In re Tobacco II Cases* (2009) 46 Cal.4th 298 (*Tobacco II*), this Court recognized that Proposition 64 serves two principal and equally important functions. First, California voters enacted Proposition 64 to restrict the category of persons who could bring UCL and FAL lawsuits, in order to address a "very specific abuse" – the use of these statutes "by unscrupulous lawyers who exploited the generous [private attorney general] standing requirement . . . to file 'shakedown' suits to extort money from small businesses." (*Tobacco II*, *supra*, 46 Cal.4th at pp. 315-316; accord, *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228 (*Mervyn's*).) Second, while narrowing the category of persons who could sue, the voters expressly sought to protect the "broad remedial purpose" of these laws by ensuring that the right of individuals and businesses to bring an action if they are injured would not be infringed. (*Tobacco II*, *supra*, 46 Cal.4th at p. 317; see Proposition 64, § 1, subd. (a), attached to Real Parties in Interest's Motion for Judicial Notice in Support of Petition for Review (MJN), Ex. 3.)

"'Proposition 64 accomplishes its goals in relatively few words.'" (*Tobacco II*, *supra*, 46 Cal.4th at p. 314, quoting *Mervyn's*, *supra*, 39 Cal.4th at p. 228.) The measure amended the UCL by deleting the provision that had previously authorized suits by unaffected plaintiffs and replacing it with a provision that authorizes suits by those who have "suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition," and by adding another provision requiring representative actions to comply with section 382 of the Code of Civil Procedure. (Bus. & Prof. Code, §§ 17203, 17204; see also *id.* at § 17535 [adding similar language to the FAL].)

The "relatively few words" by which Proposition 64 is intended to preclude frivolous actions by uninjured plaintiffs while preserving the UCL and FAL as vital tools of consumer protection are simple words with plain and

ordinary meanings. The term "injury in fact" has a well-accepted meaning under article III of the United States Constitution, and the voters were expressly told the term would have that meaning. (See MJN Ex. 3, § 1, subd. (e).) The phrase "lost money or property" also has a plain meaning: to lose money or property is to be deprived of it. The phrase "as a result of" plainly connotes a connection or cause.

Consistent with the limited purpose of Proposition 64 of eliminating the unaffected "private attorney general" feature of the UCL and FAL, the initiative made only "procedural changes with respect to standing" that "'left entirely unchanged the substantive rules governing business and competitive conduct.'" (*Tobacco II*, *supra*, 46 Cal.4th at pp. 313-314, quoting *Mervyn's*, *supra*, 39 Cal.4th at p. 232.) The initiative did not change the fact that UCL and FAL actions do not require proof of most common law tort elements. (*Tobacco II*, *supra*, 46 Cal.4th at p. 312.) It did not change the UCL's focus on the defendant's conduct rather than on the plaintiff's damages. (*Ibid.*) And it did not change the remedies available for UCL and FAL violations. (*Id.* at p. 319.) "Now, as before, no one may recover damages under the UCL." (*Mervyn's*, *supra*, 39 Cal.4th at p. 232.) The only change regarding standing is that now only those who have suffered a particular type of injury – loss of money or property – as a result of the defendant's unfair competition can bring a UCL or FAL action.

In its prior decisions concerning Proposition 64, this Court has utilized a straightforward, common-sense approach to interpreting the new standing requirements, consistent with well-established precepts of statutory construction. (See, e.g., *Mervyn's*, *supra*, 39 Cal.4th at pp. 228-229; *Tobacco II*, *supra*, 46 Cal.4th at pp. 313-321, 324-326 [referencing and applying traditional principles of statutory construction].) As these decisions make clear, the language by which Proposition 64 seeks to achieve its goals must first be accorded its plain and ordinary meaning if possible, and read in

the context of the measure as a whole and its intent. If necessary, the ballot materials that served to educate the voters may be consulted to discern the voters' intent and to ensure that the initiative is interpreted consistent with the voters' expectations based on what they were told about the measure's scope and purposes. Courts must take initiatives as they find them, neither reading into them restrictions, conditions or limitations that are not there, nor reading out of them language that is there. (*Tobacco II*, *supra*, 46 Cal.4th at p. 320, fn. 14.)

Under this analytical framework, plaintiffs here easily satisfy the initiative's new standing requirements.[1] The Court of Appeal correctly held that plaintiffs suffered "injury in fact." (*Kwikset Corp.*, *supra*, 171 Cal. App. 4th at p. 654.) But contrary to the Court of Appeal's conclusion, plaintiffs also have "lost money or property as a result of" defendants' false advertising, and, therefore, have standing to pursue relief under all three prongs of the UCL as well as the FAL.

This Court held in *Tobacco II* that a plaintiff has standing to bring an action under the UCL's "fraud" prong if reliance is shown; that is, if the defendant's misrepresentation was a substantial factor in causing the plaintiff to lose money or property. (See *Tobacco II*, *supra*, 46 Cal.4th at pp. 326-328.) That test is easily met here. Plaintiffs allege that defendants' representations that their products were "Made in U.S.A." – representations that have been proven to be deceptive – were a material factor in plaintiffs' decisions to purchase those products, and they would not have purchased those products in the absence of those representations.

The Court recognized in *Tobacco II*, however, that "the concept of reliance . . . has no application" in many cases brought under the UCL's

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[1] Throughout this brief, real parties in interest are referred to as "plaintiffs" and petitioners are referred to as "defendants" or "Kwikset."

"unlawful" and "unfair" prongs. (*Tobacco II*, *supra*, 46 Cal.4th at p. 326, fn. 17.) Rather, plaintiffs should have standing under those prongs if they lost money or property as a result of being subjected to the defendants' unlawful or "unfair" conduct. As plaintiffs here have unquestionably met the more rigorous showing of reliance on defendants' false "Made in U.S.A." advertising, which caused them to lose the money they paid for defendants' locksets, they readily satisfy the new standing requirements under all UCL prongs as well as under the FAL.

The Court of Appeal here ignored the cardinal rule of statutory construction by disregarding the plain and ordinary meaning of the words in Proposition 64's standing provision. Instead, it embellished them with restrictions, conditions and limitations that are found nowhere in the initiative or the ballot materials, and were never explained to the voters. The panel concluded that to maintain standing under Proposition 64, it was not sufficient for plaintiffs to allege they relied on defendants' false "Made in U.S.A." advertising in purchasing the defendants' products. Rather, plaintiffs also had to allege and prove the locksets were of inferior quality, did not function properly, or were sold at a premium over non-misrepresented locksets. (*Kwikset Corp.*, *supra*, 171 Cal.App.4th at pp. 653-655.) Under this formulation of the "lost money" requirement, a defendant cannot be held accountable to consumers for falsely advertising a product unless that individual can allege and prove damages (notwithstanding that such damages cannot be recovered under the UCL or FAL) or some defect in the product's operation or quality that is entirely ***unrelated*** to the claimed false advertising violation. According to the panel, the "lost money" requirement of Proposition 64 eliminated the ability of consumer purchasers to enjoin false advertising if they "receive[] a product or service of equivalent value in exchange for the payment." (*Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 655.)

A "damages or defects" standing requirement for UCL and FAL actions is not expressed in the plain language of Proposition 64, was not explained to the voters in the ballot materials, and is not necessary to achieve the specific purpose of the initiative. Indeed, it would vitiate "the guarantee made by Proposition 64's proponents that the initiative would not undermine the efficacy of the UCL as a means of protecting consumer rights." (*Tobacco II*, *supra*, 46 Cal.4th at p. 321.) It would create a formidable barrier to the courthouse door that few, if any, UCL or FAL plaintiffs could hurdle. By the same token, it would virtually immunize a wide variety of illegal conduct that the FAL and UCL were designed to remedy and deter. The panel's so-called "benefit of the bargain" rationale provides manufacturers with license to misrepresent their products and reap windfall profits from their false advertising, so long as their products have utility or a certain market value. Indeed, as a result of the court's decision, Kwikset essentially gets a free pass, notwithstanding its proven extensive violations of four California statutes. That is a result the voters never intended, and in fact sought to guard against, when they enacted Proposition 64.

Furthermore, the panel's suggestion that standing is unavailable to those who do not seek and obtain a restitution award also adds a condition found nowhere in the language of Proposition 64, and conflicts with the statutory scheme of the UCL and FAL. Obtaining restitution has never been a condition to obtaining injunctive relief because, as this Court has noted, the remedies provisions of these statutes – which are unchanged by Proposition 64 – do not "link[] injunctive and restitutionary relief." (*ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1268-1271 (*ABC*).) Standing and the equitable remedy of restitution are different concepts involving different considerations, and the voters expressed no intention to equate the two.

Contrary to the Court of Appeal's view, this is precisely the type of case the voters were told would be protected. Plaintiffs are not unaffected "private attorneys general"; they are consumers who purchased defendants' falsely advertised products based on those misrepresentations. This is not a frivolous action; it has been conclusively adjudged as meritorious after a full bench trial and been found to confer a "significant benefit" on the public. (2 Exhibits in Support of Petition for Writ of Mandate (Exs.) 255-278; Appendix Supporting Real Parties in Interest's Petition for Rehearing (Rehearing App.) 99-100.) This is not a case that unfairly burdens or tries to "shake down" small businesses; rather, it promotes fair competition in the marketplace. And this is not a case involving some minor infraction. It involves a pervasive false advertising scheme knowingly conducted over the course of five years in violation not only of the UCL and FAL, but also of two statutes (Bus. & Prof. Code, § 17533.7 and Civ. Code, § 1770(a)(4)) that were enacted precisely to protect consumers and businesses against the type of false "Made in U.S.A." advertising engaged in by these defendants. The voters would not have even remotely expected that they would be precluded from bringing this type of action or benefiting from it. Nor would they have reasonably expected that Proposition 64 would virtually eliminate private false advertising actions, contrary to the assurances in the ballot materials.

The Court of Appeal compounded its error by announcing a new interpretation of UCL and FAL standing and then flatly denying plaintiffs leave to amend their complaint to attempt to comply with it. This ruling violated California's liberal amendment policy, which recently was reaffirmed by this Court in *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235 (*Branick*). *Branick* made clear that a rule "barring amendments ***to comply*** with Proposition 64 does not rationally further any goal the voters articulated." (*Id.* at p. 241, emphasis in original.)

For these reasons, this Court should reverse the judgment of the Court of Appeal and remand with directions to enter an order summarily denying defendants' petition for writ of mandate. To the extent the complaint is held deficient, the Court should reverse the judgment of the Court of Appeal and remand with directions to allow plaintiffs to file an amended complaint in the trial court seeking to satisfy the guidelines announced in this Court's opinion.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. Defendants' Violations Are Proved at Trial and the Trial Court's Judgment Is Upheld on Its Merits

Plaintiff James Benson filed this action on January 21, 2000, on behalf of the general public, alleging that Kwikset violated the "unlawful," "unfair," and "fraudulent" prongs of the UCL and the FAL by falsely advertising their lockset products as "Made in U.S.A." and "All American Made" when they in fact were substantially made with foreign parts and labor. (1 Exs. 91-103.) Under the UCL's "unlawful" prong, plaintiff alleged Kwikset violated two California statutes specifically prohibiting false advertising concerning the country of origin of consumer products – the "Made in U.S.A." statute (Bus. & Prof. Code, § 17533.7) and the Consumers Legal Remedies Act (Cal. Civ. Code, § 1770(a)(4)) – as well as California's general false advertising statute, the FAL. (1 Exs. 95-96.)

The parties fully litigated the case, and a bench trial was held in December 2001. At trial, it was shown that Kwikset's products were made with substantial foreign labor and parts, including over a dozen parts imported from or made with foreign labor in four other countries. (Rehearing App. 108-112 [distilling trial evidence].) For example, the main latch mechanism was made in a Mexicali plant by up to 12.3% of Kwikset's entire workforce, after which Kwikset placed the locksets into packages labeled "Made in U.S.A." and "All American Made." (1 Exs. 109.)

On May 23, 2002, the Honorable Raymond J. Ikola (now an appellate justice), issued his decision in plaintiff's favor. Judge Ikola found 25 of Kwikset's product lines had violated all 4 of the statutes involved for a period of 5 years, resulting in over $94 million in illegal sales in California alone. (2 Exs. 266-272; Rehearing App. 112; *Kwikset Corp., supra*, 171 Cal.App.4th at p. 649.) The court ordered substantial equitable relief, including: (1) an injunction prohibiting Kwikset from falsely advertising its locksets; (2) a corrective disclosure program requiring Kwikset to notify their commercial customers of the false advertising; and (3) a remedial program to cleanse the marketplace by requiring Kwikset to provide either full restitution or correctly labeled products to sellers returning the falsely labeled locksets in their inventories. (2 Exs. 273-275, 277-278; *Kwikset Corp., supra*, 171 Cal.App.4th at p. 649.) In the exercise of its equitable discretion, the court declined to award restitution to consumer purchasers. (2 Exs. 275.) The court also ordered Kwikset to pay plaintiffs' attorneys' fees, plus an enhancement due to the significant benefits achieved for the public. (2 Exs. 278; Rehearing App. 97-104.)

Kwikset appealed the trial court's judgment, and on June 30, 2004, the Court of Appeal affirmed the judgment in its entirety. (*Benson v. Kwikset Corp.* (2004) 120 Cal.App.4th 301, depublished by grant of rehearing.) However, before that appellate decision became final, Proposition 64 was enacted by California voters.[2] On November 16, 2004, Kwikset immediately sought to vacate the judgment and dismiss the case on the ground that plaintiff was divested of standing by the initiative. In February 2005, the Court of

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[2] The Court had denied Kwikset's petition for rehearing, but then granted rehearing on its own motion to review a non-merits ruling concerning certain litigation costs that neither party had challenged. (See *Benson v. Kwikset Corp.* (July 29, 2004, No. G030956) 2004 Cal.App. Lexis 1274.) Proposition 64 was enacted while the court was considering that ancillary issue.

Appeal issued an opinion that again affirmed the trial court's ruling on the merits, but vacated the judgment based on its conclusion that Proposition 64's changes to the standing requirements applied to this action. (*Benson v. Kwikset Corp.* (2005) 126 Cal.App.4th 887, 897-898, depublished by grant of review.) The Court of Appeal also concluded that plaintiff should be afforded an opportunity to amend the complaint to add allegations sufficient to satisfy the initiative's new standing requirements. (*Id.* at pp. 907-908, 926.)

This Court granted plaintiff's petition seeking review of the ruling that Proposition 64 applied to this action. It deferred further action and, after issuing its decisions in *Mervyn's* and *Branick*, remanded this action to the Court of Appeal with directions to reconsider in light of *Branick*. (*Benson v. Kwikset Corp.* (2007) 57 Cal.Rptr.3d 540; *Benson v. Kwikset Corp.* (April 23, 2007, No. S132443) 2007 Cal. Lexis 6537.) In June 2007, the Court of Appeal issued its opinion reinstating its earlier decision affirming the trial court's judgment on the merits in its entirety, but remanding the case to the trial court for the limited purpose of determining whether the requirements of Proposition 64 could be met. (*Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1266.) The court instructed that if those requirements were met, "the original judgment shall be reimposed and the balance of our opinion shall stand as resolution of the issues previously raised by the parties." (*Id.* at p. 1264.)

### B. On Remand After Proposition 64, Plaintiffs Add Substantial New Allegations to Satisfy the New Standing Requirements

On October 4, 2007, Benson moved for leave to file a first amended complaint (FAC) to add the allegations required by Proposition 64. (1 Exs. 1-29.) The FAC also added several new consumer purchasers as plaintiffs, Al Snook, Christina Grecco and Chris Wilson. (1 Exs. 20-21.) All the plaintiffs, including Benson, alleged they actually relied on Kwikset's false advertising in purchasing its locksets. (1 Exs. 19-21.) Plaintiffs sought only to preserve

the judgment and equitable relief already awarded by the trial court. (1 Exs. 8.)

The trial court granted plaintiffs' motion to amend. (2 Exs. 209-230, 232-233.) Kwikset petitioned the Court of Appeal for a writ of mandate overturning that order, which was summarily denied two weeks later. (Order in *Kwikset Corp. v. Superior Court* (December 26, 2007, No. G039685), available at www.courtinfo.ca.gov.)

Immediately thereafter, Kwikset demurred to the FAC, which the trial court promptly overruled. (2 Exs. 235-254, 360-381; 3 Exs. 382-385.) On March 3, 2008, Kwikset again petitioned the Court of Appeal for a writ of mandate seeking to reverse that order, which was again denied one week later. (3 Exs. 533.) Kwikset then filed in the trial court a motion for judgment on the pleadings on the ground that plaintiffs had not alleged "injury in fact" as required by Proposition 64. (3 Exs. 391-396.) In an effort to address any concerns about the sufficiency of their pleading, plaintiffs sought and obtained leave to file a second amended complaint (SAC) – the operative complaint here – to add further details to their Proposition 64 standing allegations. (3 Exs. 426-457, 493-494.)

The SAC alleges the same causes of action based on the same wrongful conduct alleged in the original complaint and, again, seeks merely to preserve the same judgment and relief awarded by the trial court. The new standing allegations added to comply with Proposition 64 assert that each plaintiff "saw and read Defendants' misrepresentations that the locksets were 'Made in U.S.A.' at the time he [or she] purchased the locksets and relied on such misrepresentations in deciding to purchase and in purchasing them." (3 Exs. 447-449.) Further, each plaintiff "was induced to purchase and did purchase Defendants' locksets due to the false representation that they were 'Made in U.S.A.' and would not have purchased them if they had not been so misrepresented." (3 Exs. 447-449.) The SAC also alleges that "[i]n

purchasing Defendants' locksets," plaintiffs were "provided with products falsely advertised as 'Made in U.S.A.,' deceiving [them] and causing [them] to buy products [they] did not want." (3 Exs. 447-449.) Kwikset's conduct caused plaintiffs "to spend and lose the money [they] paid for the locksets," and plaintiffs "suffered injury and loss of money as a result of Defendants' conduct adjudicated to be unlawful." (3 Exs. 447-449.)

Notwithstanding these substantial additions, Kwikset again demurred. (3 Exs. 506-510.) The trial court rejected Kwikset's contentions that plaintiffs had not adequately alleged standing under Proposition 64, and overruled the demurrer on July 10, 2008. (3 Exs. 606-608.) Kwikset thereafter filed its third post-Proposition 64 writ petition, asking the Court of Appeal to reverse the trial court's decision upholding the SAC. On August 29, 2008, the same panel that had considered and rejected Kwikset's prior attempts to undo the judgment agreed to consider this latest petition, and stayed the trial on the Proposition 64-related issues that was scheduled to take place just a few months later.

### C. The Court of Appeal Orders the Case Dismissed and Denies Leave to Amend Notwithstanding the Proven Violations and Its New Articulation of UCL Standing

On February 25, 2009, the Court of Appeal issued its decision reversing the trial court's order overruling Kwikset's demurrer, and denying plaintiffs leave to amend. The court first held that the "injury in fact" test was satisfied because plaintiffs' allegations that they purchased defendants' locksets based on their false advertising sufficiently pled the invasion of a legally protected interest. (*Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 653.)

The appellate court held, however, that plaintiffs had failed to adequately allege they "lost money or property as a result of" the misrepresentations. The panel found plaintiffs' allegations that they relied on

Kwikset's false advertising in purchasing the locksets and that such wrongful conduct "caused [them] to spend and lose the money . . . paid for the locksets" to be insufficient because plaintiffs "received locksets in return." (*Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 653.)

> [Plaintiffs] do not allege the locksets were defective, or not worth the purchase price they paid, or cost more than similar products without false country of origin labels. Nor have real parties in interest alleged the locksets purchased either were of inferior quality or failed to perform as expected.

(*Id.* at pp. 653-654.) Absent allegations complaining about the "cost, quality or operation" of the locksets in addition to the allegation that they were falsely advertised as "Made in U.S.A.," the court reasoned, plaintiffs have "received the benefit of their bargain," and consequently have not "lost money or property as a result of" Kwikset's proven unfair competition and false advertising. (*Id.* at pp. 654-655.)

Finally, even though Kwikset's demurrer had been overruled in the trial court, the Court of Appeal flatly denied plaintiffs' request for leave to amend. The court rejected outright plaintiffs' proffer, offered in their return to the writ petition, at oral argument, and in their subsequent petition for rehearing, that they could meet the panel's newly-articulated interpretation of the standing rules with facts from the trial court record as well as supplemental facts and expert testimony. (*Kwikset Corp.*, *supra*, 171 Cal.App.4th at pp. 656-657; Real Parties' Return to Petition for Writ of Mandate (Return) 42-43; Rehearing App. Ex. 1; Real Parties' Petition for Rehearing (Rehearing Pet.) 3-8; Order Denying Rehearing Petition, dated March 18, 2009.) The Court of Appeal's writ of mandate ordering the trial court to enter a judgment dismissing this action constitutes a final judgment.

## III. ARGUMENT

### A. Under This Court's Analytical Framework Controlling the Interpretation of Proposition 64, Consumers Who Purchase Falsely Advertised Products as a Result of the Defendant's Wrongful Conduct, as Plaintiffs Did Here, Have Standing to Bring a UCL or FAL Action

#### 1. Controlling Statutory Construction Principles

As amended by Proposition 64, the UCL and FAL may be privately enforced only by a person "who has suffered injury in fact and has lost money or property as a result of" the unfair competition or false advertising. (Bus. & Prof. Code, §§ 17204, 17535.) In giving meaning to these words in sections 17204 and 17535, as amended by the initiative, a court's task "'is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent.'" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901, citation omitted; accord, *County of Alameda v. Kuchel* (1948) 32 Cal.2d 193, 199 [it is "a cardinal rule that statutes should be given a reasonable interpretation and in accordance with the apparent purpose and intention of the law makers"].)

This Court recently had occasion in *Tobacco II* to construe the UCL as amended by Proposition 64. In doing so, the Court followed the same straightforward and well-settled approach to statutory construction that has long been used by the courts of this State. First, courts are to give the words of the initiative their plain meaning whenever possible: "The first principle of statutory construction requires us to interpret the words of the statute themselves, giving them their ordinary meaning, and reading them in context of the statute (or, here, the initiative) as a whole." (*Tobacco II*, *supra*, 46 Cal.4th at p. 315.) "If the language is unambiguous, there is no need for further construction." (*Ibid.*)

Second, if "the language is susceptible of more than one reasonable meaning," courts "may consider the ballot summaries and arguments to

determine how the voters understood the ballot measure and what they intended in enacting it." (*Tobacco II, supra,* 46 Cal.4th at p. 315.)

Finally, the Court emphasized that when applying these construction rules to a ballot initiative, courts must take the measure as they find it, "neither reading into it language that is not in it, nor reading out of it language that is to support some presumed intention of the electorate." (*Tobacco II, supra,* 46 Cal.4th at p. 320, fn. 14.) The Court made clear that any construction of Proposition 64's standing requirements must be consistent with the voters' expectations based on what they were told about the initiative's scope, intent and purposes. (See *id.* at pp. 315, 317, 321, 324; see also *Arias v. Superior Court* (2009) 46 Cal.4th 969, 978-979; *In re Lance W.* (1985) 37 Cal.3d 873, 889 [in interpreting an initiative, intent of voters is "the paramount consideration"].)

Under these settled precepts, the new UCL and FAL standing requirements must be given their plain meaning consistent with the purpose of the initiative and the overall statutory scheme. They may not be embellished with additional requirements, conditions, or limitations that were never explained to the voters.

### 2. The Initiative Requires Only that the Plaintiff Be Deprived of Money or Property as a Result of the Defendant's Misconduct

Plaintiffs here satisfy the standing requirements of Proposition 64 within the ordinary meaning of their terms. Proposition 64, by its plain language, confers standing on a person who has suffered a particular type of injury – "lost money or property" – that has a connection to the defendant's wrongful conduct.[3] As the Court of Appeal here observed, the ordinary

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[3] With respect to the "injury in fact" requirement, Proposition 64 states that "[i]t is the intent of the California voters in enacting this act to prohibit

meaning of "lose" is "to suffer deprivation of." (*Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 653; see also Miriam-Webster's Collegiate Dictionary (11th ed. 2003) p. 736 [providing same definition]; 3 Exs. 607 [trial court defines "loss" in similar manner].) In short, to lose money is to be deprived of it. "Lost money" has a plain and ordinary meaning that readily encompasses what happened to plaintiffs here. As the SAC alleges, plaintiffs were deprived of the money they paid for defendants' products as a result of defendants' unlawful conduct. They paid money out of pocket for a product advertised as one thing, but received a product that was something else.

Plaintiffs also satisfy the "as a result of" requirement within the ordinary meaning of that phrase. Proposition 64 amended section 17204 of the UCL to provide standing to one who has "lost money or property as a result of such unfair competition." (Bus. & Prof. Code, § 17204.) This language suggests some connection between the injury and the defendant's conduct that violates one of the three prongs of the UCL. (*Tobacco II*, *supra*, 46 Cal.4th at p. 325 ["it is clear that the phrase ["as a result of"] indicates there must be some connection between the injury and the defendant's conduct"]; *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1098 (*Daro*) ["as a result of" language requires plaintiff to show "that the injury suffered and the loss of

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private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (MJN Ex. 3, § 1, subd. (e).) As the Court of Appeal correctly found, therefore, "injury in fact" is the same as the federal standing requirement and an "injury in fact" under article III of the United States Constitution means "an actual or imminent invasion of a legally protected interest." (*Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 653, citation and internal quotation omitted.) The panel correctly concluded that, in light of the several statutes making "truthful country of origin product labeling . . . a legally protected interest" and the allegations that plaintiffs purchased the misrepresented products, plaintiffs here readily satisfy the minimal "injury in fact" standing requirement. (*Ibid.*)

property or money resulted from conduct that fits within one of the categories of 'unfair competition' in section 17200"].) The nature of the required connection between the violation and defendant's conduct may vary depending on the particular type of UCL violation alleged, as this Court observed in *Tobacco II*.

There, this Court held that the "as a result of" language in Proposition 64 means that, for standing purposes, a plaintiff "proceeding on a claim of misrepresentation" under the "fraud" prong of the UCL must demonstrate "actual reliance on the allegedly deceptive or misleading statements." (*Tobacco II, supra*, 46 Cal.4th at pp. 306, 326.) The Court found that reliance supplied the necessary connection for claims based on a misrepresentation because "reliance is the causal mechanism of fraud." (*Id.* at pp. 325-326.)

The Court emphasized, however, that its holding in *Tobacco II* is limited to UCL cases alleging "a fraud theory involving false advertising and misrepresentations to consumers," and explicitly reserved for another day consideration of what connection is required by the "as a result of" phrase in UCL cases based on other types of wrongful conduct under the UCL (i.e., unlawful or "unfair" conduct). (*Tobacco II, supra*, 46 Cal.4th at pp. 325-326 and fn. 17.)[4] The Court noted, however, that "[t]here are doubtless many types of unfair business practices in which the concept of reliance, as discussed here, has no application." (*Id.* at p. 326, fn. 17.)

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[4] Importantly, this case succeeded on its merits under all three prongs of the UCL, as well as the FAL. The original complaint alleged, and the trial court found, that defendants' false "Made in U.S.A." advertising violated all three prongs. (1 Exs. 95-97; 2 Exs. 266-272; *Kwikset Corp., supra*, 171 Cal.App.4th at pp. 648-649.) The SAC contains the same allegations of defendants' wrongful conduct as the original complaint and seeks to preserve the judgment and relief ordered by the trial court and affirmed on appeal under all three prongs. (3 Exs. 426-457.)

Indeed, conduct may be "unlawful" or "unfair" under the UCL even if not "deceptive." (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).) The "unlawful" prong borrows violations of other statutes and makes them "independently actionable" under the UCL. (See, e.g., *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1266 (*Tobacco Cases II*); *Cel-Tech, supra*, 20 Cal.4th at p. 180.) But there are many statutes, the "Made in U.S.A." law among them, where the violation is measured solely by the defendant's conduct, not by any other party's reliance on that conduct. Likewise, "[t]he UCL imposes strict liability when property or monetary losses are occasioned by conduct that constitutes an unfair business practice." *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 181 (*Cortez*).)

Reliance, therefore, should not be required for standing under the "unfair" or "unlawful" prongs (unless, for cases in the latter category, reliance is the causal mechanism for the underlying offense). Rather, as various post-Proposition 64 cases already have demonstrated, in most cases under those prongs, all that is required is that the plaintiff lose money or property as a result of being subjected to the defendant's unlawful or unfair conduct. (See *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1090 [holding plaintiff had standing because she lost property as a result of being "subjected to" defendant's conduct in violation of statute]; *Aron v. U-Haul* (2006) 143 Cal.App.4th 796, 802-803 [plaintiff had UCL standing when U-Haul failed to comply with weights and measurement statutes, leaving plaintiff to overfill gas tank when returning rental truck; being subjected to statutory violation, coupled with payment of gas, is sufficient for standing]; cf. *Daro, supra*, 151 Cal.App.4th at pp. 1086, 1097-1098 [plaintiffs lacked UCL standing because

claimed loss of property did not result from alleged statutory violation].)[5] Here, of course, plaintiffs were subjected to defendants' unlawful conduct in violation of four California statutes designed to protect consumers from false advertising, including two specifically designed to protect consumers from false representations of a product's country of origin.

In any event, plaintiffs allege they purchased defendants' locksets in actual reliance on their false "Made in U.S.A." advertising and, therefore, readily satisfy the "as a result of" requirement under all of the UCL prongs, as well as under the FAL. (3 Exs. 447-449 [each plaintiff "saw and read Defendants' misrepresentations that the locksets were 'Made in U.S.A.' at the time he [or she] purchased the locksets and relied on such misrepresentations in deciding to purchase and in purchasing them"].)[6] The SAC also alleges each plaintiff "was induced to purchase and did purchase Defendants' locksets due to the false representation that they were 'Made in U.S.A.' and would not

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[5] *Daro* illustrates when a plaintiff alleging a statutory violation would not satisfy the causation requirement. In *Daro*, the UCL plaintiffs were lawfully evicted from their apartments pursuant to the Ellis Act. The statutory violation upon which their UCL claim was based, however, was the Subdivided Lands Act, an act that was not intended to protect tenants and had no connection with the lawfulness of their evictions. (*Daro*, *supra*, 151 Cal.App.4th at p. 1098.) The Court of Appeal found plaintiffs lacked standing because "[t]he tenants are not among the class of persons the Subdivided Lands Act was intended to protect, and they have suffered no harm as a result of any violation of its provisions." (*Ibid.*) Had the defendant violated the Ellis Act, however, plaintiffs would have had standing based on that statutory violation.

[6] The Court in *Tobacco II* was careful to note the reliance component of standing does not require a plaintiff "to plead or prove an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements when the unfair practice is a fraudulent advertising campaign" that is widespread or longstanding, as it is in this case. (*Tobacco II*, *supra*, 46 Cal.4th at p. 306.) Nevertheless, plaintiffs have alleged they relied on the specific unlawful "Made in U.S.A." representations that appeared on defendants' locksets when they purchased those locksets. (3 Exs. 447-449.)

have purchased them if they had not been so misrepresented." (3 Exs. 447-449.) "In purchasing Defendants' locksets," plaintiffs were "provided with products falsely advertised as 'Made in U.S.A.,' deceiving [them] and causing [them] to buy products [they] did not want." (3 Exs. 447-449.) Kwikset's conduct caused plaintiffs "to spend and lose the money [they] paid for the locksets," and plaintiffs "suffered injury and loss of money as a result of Defendants' conduct adjudicated to be unlawful." (3 Exs. 447-449.) Kwikset's false advertising scheme also was pervasive, involving more than two dozen product lines falsely advertised over the course of five years. (2 Exs. 266-273; *Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 649.)

These allegations are more than sufficient to allege standing under Proposition 64. Simply stated, plaintiffs have standing because they "are direct victims of the unlawful conduct, rather than simply unharmed persons suing on behalf of the general public." (*Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 131.)

### B. The Court of Appeal's Interpretation of "Lost Money" as Requiring a Showing of Damages or Product Defects Conflicts with the Plain Language and Broader Statutory Context of Proposition 64

Applying the first principle of construction – giving the words their ordinary meaning – to Proposition 64 in *Tobacco II*, this Court found that "it is obvious that nothing in its plain language supports the trial court's construction of it as imposing the standing requirement on absent class members." (*Tobacco II*, *supra*, 46 Cal.4th at p. 315.) Applying this first principle to Proposition 64 here, it is equally obvious that nothing in its plain language supports the Court of Appeal's construction of it as imposing a requirement on consumers to show damages or product defects to obtain standing in a false advertising case. Nor is such a construction necessary to address the "very specific abuse" at which Proposition 64 was directed. (See

*id.* at pp. 315, 316.)

First, the Proposition uses simple language – "lost money" – rather than a legal term such as "damages" or a complex economic term such as "market premium," "market differential," or "market value." The initiative also does not use any language requiring consideration of the quality or operation of a product a consumer receives as a result of a defendant's unfair competition or false advertising.

Second, as noted previously, the words of the initiative must be read in the context of the measure as a whole. (*Tobacco II*, *supra*, 46 Cal.4th at p. 315.) Proposition 64 amended section 17204 of the UCL to provide standing to one who has "lost money or property ***as a result of such unfair competition***." (Bus. & Prof. Code, § 17204, emphasis added.) Likewise, the initiative amended section 17535 of the FAL to provide standing to one who has "lost money or property ***as a result of a violation of this chapter***." (Bus. & Prof. Code, § 17535, emphasis added.) Therefore, the causal nexus that is required is between the loss of money and the alleged violation of the UCL or FAL.

In this case, the alleged (and proven) UCL and FAL violations that caused plaintiffs to lose their money consisted of defendants' false "Made in U.S.A." advertising – not inferior product quality or overpricing. Thus, plaintiffs did not allege in this case that defendants violated the law by committing an antitrust-type violation or by otherwise charging too much for their locksets. Plaintiffs also did not allege a product liability-type claim or otherwise assert that the locksets were defective. Accordingly, the Court of Appeal's interpretation that a plaintiff bringing a false advertising action must not only lose money as a result of the false advertising violation but also must demonstrate – just to get in the courthouse door – an overcharge or product defect that is ***unrelated to the violation*** makes no sense and cannot be squared with the plain language of Proposition 64.

Furthermore, the additional allegations required by the Court of Appeal – that the products plaintiffs received were defective, functioned improperly, or had a lesser market value than the ones they wanted – have no place in the analysis of standing under the statutory scheme of the UCL and FAL. These are the types of injuries that traditionally would be pled in some other type of tort case, such as a product defect case or certain common law fraud actions. It has long been settled, however, that UCL and FAL claims do not share all the same attributes of tort liability, and pleading such facts has never been required. (See, e.g., *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1151.) For example, as this Court recently reaffirmed, "[t]he fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud." (*Tobacco II*, *supra*, 46 Cal.4th at p. 312.) Whereas common law fraud requires a knowingly false statement, actual deception and damages, "'[n]one of these elements are required'" to prove UCL or FAL liability. (*Ibid.*, quoting *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 332.) Instead, such liability has always been, and continues to be, established with facts showing only that "'members of the public are likely to be deceived.'" (*Tobacco II*, *supra*, 46 Cal.4th at p. 312, quoting *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951.) Moreover, the Court of Appeal's view that standing now can only be maintained when the plaintiff has demonstrated that the value of what was paid is greater than the value of what was received is the measure of damages in fraud cases (see Civ. Code, § 3343(a)), yet such compensatory tort damages have never been, and still are not, available under the UCL and FAL. (*Mervyn's*, *supra*, 39 Cal.4th at p. 232.)[7]

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[7] Even the defendants conceded in their demurrer that Proposition 64 does not require plaintiffs to establish such a market premium or differential to have standing under the UCL and FAL. (3 Exs. 559.)

This Court explained in *Tobacco II* that these distinctions between the UCL and other tort causes of action "reflect[] the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." (*Tobacco II, supra*, 46 Cal.4th at p. 312, citing *Fletcher v. Security Pacific Nat. Bank* (1979) 23 Cal.3d 442, 453 (*Fletcher*); see also *Tobacco II, supra*, 46 Cal.4th at p. 324 ["the focus of the statute is on the defendant's conduct"].) The Court noted this is the reason damages are not permitted under the UCL: "To achieve its goal of deterring unfair business practices in an expeditious manner, the Legislature limited the scope of the remedies available under the UCL" to equitable relief. (*Tobacco II, supra*, 46 Cal.4th at p. 312; accord, *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 744 (*Dean Witter*) ["To permit individual claims for compensatory damages to be pursued as part of such a procedure would tend to thwart this objective by requiring the court to deal with a variety of damage issues of a higher order of complexity."].)

This Court has emphasized that Proposition 64 "'left entirely unchanged the substantive rules governing business and competitive conduct,'" and "'[n]othing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted.'" (*Tobacco II, supra*, 46 Cal.4th at p. 314, quoting *Mervyn's, supra*, 39 Cal.4th at p. 232). The Court of Appeal's interpretation would directly contradict this conclusion: falsely advertising products as "Made in U.S.A." was unlawful before Proposition 64 without a showing of damages or product defects, yet such conduct would escape liability now under the panel's ruling.

The imposition of a new damages element for standing also would result in the anomalous situation in which consumers would have to establish damages just for standing purposes, even though they cannot recover any damages once liability is established, and even if they seek only injunctive

relief (as plaintiffs do here). Such an interpretation is manifestly unreasonable, especially in light of the absence of any expression of such intent by (or to) the voters.

Additionally, the panel's assertion that one does not have standing to challenge even the most egregious false or deceptive advertising when one has received "the benefit of the bargain" (*Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 655) finds no support in the language of the initiative or in its stated purposes. The fact that a product may have some utility or value unrelated to the falsely advertised trait is simply irrelevant to the standing inquiry. The voters were never told that meritorious false advertising cases could not be brought where the product functions properly and was not overpriced. In *Tobacco II*, this Court held that the representative plaintiffs had standing so long as they relied on the deceptive advertising to which they were exposed. The Court did ***not*** hold that plaintiffs lacked standing because they bought cigarettes that functioned like cigarettes and cost no more than their fair market value.

The panel's "benefit of the bargain" interpretation not only is irrelevant to the standing inquiry, it also is inaccurate. Consumers, such as plaintiffs here, do not receive the benefit of their bargain when they purchase a product that has been materially misrepresented. Plaintiffs here bargained for locksets made in America, but received for their money locksets substantially made in foreign countries and with foreign parts that they did not want. (See 3 Exs. 447-449.) They certainly did not receive the benefit of their bargain.

Similarly, there is no textual or other support for the panel's suggestion that standing is unavailable to those who do not seek and obtain restitution. (See *Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 655.) Standing and the equitable remedy of restitution are different concepts involving different considerations. Standing is what shows the court there is a live controversy brought by a plaintiff with the necessary stake in the outcome. (See, e.g.,

*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439.) "'[T]he question of standing to sue is one of the right to relief and goes to the existence of a cause of action against the defendant.'" (*Phillips v. Crocker-Citizens Nat. Bank* (1974) 38 Cal.App.3d 901, 910, citation omitted.)

On the other hand, the purpose of the UCL's remedial provisions is "'to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.'" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267, quoting *Fletcher*, *supra*, 23 Cal.3d at p. 449.) Importantly, under the UCL scheme, these remedies are equitable in nature, and the trial court is vested with "broad and sweeping" authority to fashion an appropriate remedy designed to achieve the statute's goals. (*Fletcher*, *supra*, 23 Cal.3d at p. 450 [interpreting nearly identical language in § 17535 of the FAL].) In exercising this broad discretion, the trial court is tasked with weighing all the equities, including those that may militate against any particular award. (See *Cortez*, *supra*, 23 Cal.4th at pp. 180-181.)

Proposition 64 altered the standing requirement to restrict the right to bring private enforcement actions under the UCL to affected plaintiffs, and the initiative's terms must be construed "in light of this intention to limit such actions." (*Tobacco II*, *supra*, 46 Cal.4th at pp. 314, 326.) But the initiative neither equates the standing analysis with the remedies analysis, nor confers standing only on those who seek and obtain restitution. If that is what the drafters had intended, they could easily have said so. The proponents also could have explained such an intention in the initiative's "Findings and Declarations of Purpose" or in the ballot materials, but they did not.

It is inappropriate to read into Proposition 64 restrictions that were never included by the drafters, explained by its proponents, or approved by the voters. Standing and restitution, now, as before, are different concepts and require different inquiries. The allegations of the SAC are more than sufficient to establish plaintiffs' personal stake in the outcome of this case

because they demonstrate that plaintiffs were directly affected by defendants' illegal and deceptive conduct (they read and relied upon the false advertising), and lost money as a result (they paid for a product they did not want). The trial court's decision not to award restitution to the vast number of consumers who purchased the falsely advertised products, on the other hand, was based on a number of equitable considerations, including that it would be too expensive to administer. (2 Exs. 275.) Such considerations, however, do not detract from the fact that plaintiffs were injured by defendants' illegal conduct – they lost money – and are entitled under Proposition 64 to seek (in this case, preserve) appropriate injunctive relief available under the UCL.

Under the Court of Appeal's interpretation, moreover, a plaintiff could not even seek injunctive relief unless he or she could also obtain a restitution award. But this would conflict with the express terms of the statutes and, again, add a restriction not in the initiative. Courts have always had the authority to issue injunctions in UCL and FAL actions without awarding monetary relief, and vice versa, because the statutes contain "no language of condition linking injunctive and restitutionary relief." (*ABC*, *supra*, 14 Cal.4th at pp. 1268-1271; see *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126 (*Kraus*) ["Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices."].) As this Court observed in *Tobacco II*, "Proposition 64 did not amend the remedies provision of section 17203. This is significant because under section 17203, ***the primary form of relief*** available under the UCL to protect consumers from unfair business practices ***is an injunction***, along with ancillary relief in the form of such restitution "as may be necessary . . . ." (*Tobacco II*, *supra*, 46 Cal.4th at p. 319, emphasis added.) Had the voters intended to so drastically alter the availability of relief under the UCL and FAL, they would have said so expressly and amended the statutes to do so.

In sum, the panel impermissibly injected terms, conditions and limitations that are not dictated by the ordinary meaning of the initiative's words, were not explained to voters in the ballot materials, and are not required by the context of the initiative as a whole or by the UCL's overall statutory scheme. (See *Tobacco II, supra*, 46 Cal.4th at p. 321.) If the voters had intended to abolish false advertising cases in the absence of damages or product defects, or where the consumer received "the benefit of the bargain," or where equitable restitution may not be warranted, it would have been a simple matter to have said so. (See *id.* at p. 320 ["Had [it] been the intention of the drafters of Proposition 64 – to limit the availability of class actions under the UCL only to those absent class members who met Proposition 64's standing requirements – presumably they would have amended section 17203 to reflect this intention. Plainly, they did not."].) They certainly did not say so when they required UCL and FAL plaintiffs to show only that they "lost money or property as a result of" the alleged violation.

Plaintiffs here are precisely the types of plaintiffs Proposition 64 sought to protect – namely, consumers who were directly affected and injured by defendant's misconduct because they "viewed" and relied upon "the defendant's advertising," got a misrepresented product they did not want, and lost money out of pocket as a result. (MJN Ex. 3, § 1, subd. (b)(3).)

### C. The Court of Appeal's Interpretation of Proposition 64 Not Only Is Unnecessary to Remedy the Specific Abuse at Which the Initiative Was Directed, but It Would Undermine the Measure's Guarantee to Protect the Rights of Consumers and Businesses

Because, as shown, the plain terms of Proposition 64 do not require – indeed, do not even suggest – that a plaintiff must demonstrate anything more than having been deprived of money or property as a result of the alleged UCL or FAL violation, "there is no need for further construction." (*Tobacco II, supra*, 46 Cal.4th at p. 315.) Nevertheless, the Court of Appeal's error here is

highlighted by the absence in the initiative's statement of purpose and in the ballot materials of any support for the proposition that the additional conditions imposed by the panel on UCL and FAL standing are necessary to achieve the goals of the measure.

On the contrary, as elaborated below, the Court of Appeal's interpretation of Proposition 64 would eviscerate California's vital consumer protections in the UCL and FAL – a result the proponents of the initiative assured the voters would not occur. If allowed to stand, the panel's decision here will largely write private enforcement out of these laws, especially with respect to false advertising actions, and thereby eliminate what California voters recognized as an important tool of consumer protection.

As noted above, Proposition 64 targeted a "specific abuse" by certain lawyers who exploited the former private attorney general standing provisions of the UCL. (*Tobacco II*, *supra*, 46 Cal.4th at p. 316.) Consequently, "'[t]he intent of California voters in enacting' Proposition 64 was to limit such abuses by 'prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact.'" (*Mervyn's*, *supra*, 39 Cal.4th at p. 228, quoting Proposition 64, § 1, subd. (e) (MJN Ex. 3).) The initiative further explained that its purpose was to eliminate the standing of those "who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant." (MJN Ex. 3, § 1, subd. (b).) Here, however, plaintiffs have been directly affected in these ways and actual pecuniary injury occurred as a result. In addition, the allegations of the operative complaint already have been demonstrated to be true, establishing that this is not a frivolous "shakedown" suit but a meritorious one.

Deterring frivolous suits, however, was not the initiative's only goal. "[T]he ballot materials also support the conclusion that Proposition 64 did not propose to curb the broad remedial purpose of the UCL." (*Tobacco II*, *supra*,

46 Cal.4th at p. 317.) Voters were assured that private actions would be preserved so long as the plaintiff was personally affected and had standing sufficient to satisfy the United States Constitution. (MJN Ex. 3, § 1, subd. (a), (c).) "[T]he proponents of Proposition 64 told the electorate that the initiative would not alter the statute's fundamental purpose of protecting consumers from unfair business practices." (*Tobacco II, supra*, 46 Cal.4th at p. 324; see MJN Ex. 3, § 1 subd. (a).)

The drafters also 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." (MJN Ex. 3, § 1, subd. (d).) In response to arguments expressing concern that actions designed to halt harmful conduct by corporations would be eliminated, the voters expressly were told that "Proposition 64 would permit ALL the suits cited by its opponents." (MJN Ex. 4, p. 2.) They were assured that the measure "[p]rotects your right to file suit if you've been harmed." (MJN Ex. 4, p. 2.)

In short, the voters wanted to prevent the filing of "frivolous" lawsuits that "misused" the unfair competition laws "without creating a corresponding public benefit," while ensuring that meritorious actions will continue to be prosecuted to provide consumers legal redress and foster clean competition among businesses. (MJN Ex. 3, § 1, subd. (b)(1), (c), (d).) The latter protection is especially significant to businesses that play by the rules, such as companies that truthfully advertise their products as "Made in U.S.A." Before Proposition 64 and still today, the UCL "governs anti-competitive business practices as well as injuries to consumers, and has as a major purpose the preservation of fair business competition." (*Tobacco Cases II, supra*, 41 Cal.4th at p. 1266, internal quotation omitted; see MJN Ex. 3, § 1, subd. (a).)

Interpreting the "lost money" requirement as plaintiffs urge here would satisfy both the initiative's express objectives. Plaintiffs were injured by the

defendants' unlawful conduct (i.e., they lost money as a result of the false advertising) and are therefore the type of affected plaintiffs Proposition 64 expressly intended to protect. At the same time, permitting the case to proceed will ensure that defendants will be held accountable for their proven illegal conduct through the prohibitory and mandatory injunctive relief ordered by the trial court. This would vindicate the UCL's underlying goal to prevent and deter unfair business practices, the FAL's goal to prevent false advertising, and the CLRA's and "Made in U.S.A." statute's goal to prevent misrepresentations concerning a product's country of origin.

On the other hand, imposing conditions on UCL standing that appear nowhere in Proposition 64 or in the ballot materials and are not necessary to effectuate the purposes of the initiative "would undermine the guarantee made by Proposition 64's proponents that the initiative would not undermine the efficacy of the UCL as a means of protecting" the rights of both consumers and businesses. (*Tobacco II*, *supra*, 46 Cal.4th at p. 321.)

As this case illustrates, the panel's interpretation of the "lost money" requirement would deny consumers standing to pursue even meritorious cases that provide a significant public benefit by policing acts of unfair competition. Private consumer actions would be dismantled even though liability has been proven and injunctive relief is available (or ordered in this case). The panel's construction would provide unscrupulous businesses with a license to lie about their products and induce consumers to purchase their products based on the lie, so long as what they provide to consumers has a similar market value to what was actually promised and is not defective. (*Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 655 ["a party does not lose money or property for purposes of maintaining a private UCL or FAL action when he or she receives a product or service of equivalent value in exchange for the payment"].) Regardless of the fact that the consumer has not received the desired advertised product, that individual could not sue to stop the deception unless there happened to be a

market differential or a product malfunction – regardless of how unrelated those traits might be to the falsely advertised trait. On the facts of this case, two statutes specifically proscribing false representations of the geographic origin of products (Bus. & Prof. Code, § 17533.7 and Civ. Code, § 1770(a)(4)), as well as two statutes generally proscribing false advertising (the UCL and the FAL), would be rendered meaningless under the Court of Appeal's construction.

The Court of Appeal's interpretation also would preclude private enforcement against many other types of egregious misconduct under the UCL that have nothing to do with the cost, quality or operation of consumer products. Just with respect to false advertising alone, the panel's interpretation would preclude many meritorious cases. For example, many religious groups depend on food label representations to comply with their religious practices. A hot dog falsely advertised as "kosher" has some nutritional and market value, and may be of good quality as a food product, but nevertheless would be abhorrent to observant Jews. Food label representations (e.g., "lactose-free," "not made with peanuts") and other product claims (e.g., "flame-retardant," "hypoallergenic") also are critically important for many health and safety reasons. Many consumers purchase products based on their environmental claims (e.g., "phosphorous-free," "biodegradable"). The voters were never informed that if such material traits were misrepresented, private lawsuits under the consumer protection laws would no longer be available to rectify the perpetrator's illegal, unfair and deceptive conduct.

The Court of Appeal dismissed these concerns, observing that public prosecutors can pursue the wrongdoers without the same standing requirements. (*Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 656.) As current economic conditions illustrate, public prosecutors do not have the resources to fill any private enforcement gap. More importantly, this Court already has rejected this justification for emasculating private enforcement efforts under

the UCL, because the statutory scheme expressly contemplates both governmental oversight and vigorous private enforcement. "'This [C]ourt has repeatedly recognized the importance of these private enforcement efforts.'" (*Tobacco II, supra*, 46 Cal.4th at p. 313, quoting *Kraus, supra*, 23 Cal.4th at p. 126.) Actions by public prosecutors to challenge unfair business practices have fundamentally different characteristics than those brought by private individuals, and each serves a distinctly different purpose in the statutory scheme. (See *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10.)

It is not within the courts' purview to alter the statutory scheme by placing obstacles in the path of private enforcement that neither the Legislature nor the voters intended. Because a statute must be construed in a manner consistent with its "overall . . . scheme . . . the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." (*Professional Engineers in Cal. Government v. Kempton* (2007) 40 Cal.4th 1016, 1037, citations and internal quotation omitted.)

Therefore, requiring consumers to plead and prove damages or defects to establish standing to bring UCL actions would undermine the "overarching legislative concern" of the UCL to provide equitable relief to prevent ongoing or threatened acts of unfair competition in an "expeditious manner." (*Dean Witter, supra*, 211 Cal.App.3d at p. 744; *Tobacco II, supra*, 46 Cal.4th at p. 312.) The voters expressed no intention to jettison these statutes' fundamental purposes, to switch the focus to the plaintiff's damages from the defendant's conduct, and to either change the scope of available remedies (by allowing damages) or require a showing of damages that are unrecoverable. Certainly, if the voters had even remotely intended any such results, they would have said something more than "lost money or property." Instead, Proposition 64 changed only one of the unique features of the UCL and FAL – the unaffected, "private attorney general" plaintiff. Although some proponents of the

initiative may have hoped for a more dramatic overhaul of these statutes, that is ***not*** what they told the voters Proposition 64 would accomplish.

If the Court of Appeal's formulation is correct, then the drafters and proponents of Proposition 64 will have significantly misled the voters. A rule that a consumer must plead and prove a market premium or the market availability of other products would erect an unfair, and in many cases impossible, burden. Whether a consumer could have bought a product or service from another source at a lower price or paid a market premium based on a particular aspect of a product is difficult to plead, much less prove (not to mention doing so at the beginning of a case).

The approach used by the Court of Appeal here also would generate significant procedural and case management issues. For instance, just to establish standing, would a trial court have to bifurcate the case into standing and merits trials, inasmuch as UCL defendants undoubtedly would argue that the threshold issue of standing must be determined before the merits? In such event, a plaintiff would have to prove essentially a damages case in a trial on standing at the pleading stage, before discovery, in order for the plaintiff to proceed to another trial on the merits, even if only to obtain injunctive relief. If cases were not bifurcated, would standing ultimately be determined at the end of cases rather than the beginning, inasmuch as UCL defendants would argue that a plaintiff should be divested of standing if damages were not proven at trial?

Whether or not such procedures were implemented, imposing upon consumers the burden to prove a market differential – necessarily involving complex and expensive expert reports, market analyses, testimony and evidence – would be enough to sink many meritorious cases, if they were even filed at all. In many cases, the exercise would be futile from the start, if the falsely advertised feature does not affect the product's market value or if there are no comparable truthfully advertised products available. Proving a product

defect is no less burdensome and, again, wasteful and futile in cases that do not complain of product defects. Nothing in the language of Proposition 64 or the ballot materials educating the voters on the initiative's intent and effect disclosed that such burdens would be imposed on consumers just to have standing to even come to court.

### D. If Plaintiffs' Allegations Are Deemed Insufficient to Satisfy This Court's Interpretation of the Standing Requirements, Plaintiffs Should Be Permitted Leave to Amend, Consistent with Settled Authority Liberally Favoring Amendment

For the reasons discussed above, the SAC sufficiently alleges standing under Proposition 64, and this Court should reverse the Court of Appeal's judgment and remand with directions to enter an order summarily denying defendants' petition for writ of mandate. Should this Court determine, however, that the initiative demands facts not pleaded in the SAC, it nevertheless should reverse to allow plaintiffs the opportunity to amend their complaint in the trial court. The Court of Appeal's dismissal without leave to amend – after nearly a decade of litigation including a trial decided in favor of the original plaintiff and affirmed on appeal – is contrary to this Court's established precedent favoring the liberal amendment of pleadings, particularly when (as here) the amendment issue arises after a demurrer was overruled and there have been substantive changes in the governing law.

Dismissal on the pleadings is disfavored. A complaint is "not susceptible to disposition on demurrer" if "the record does not contain enough information to establish as a matter of law that the complaint fails to state a cause of action." (*Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 996.) Leave to amend after demurrer "is properly granted where resolution of the legal issues does not foreclose the possibility that the plaintiff may supply necessary factual allegations." (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.) "If the plaintiff has not had an opportunity to

amend the complaint in response to the demurrer," as is the case here, "leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment." (*Ibid.*) Indeed, amendment is freely allowed at any stage of a proceeding. (E.g., *id.* at pp. 746-747; *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 255-256; see Code Civ. Proc., § 472c, subd. (a).)

In *Branick*, this Court made clear Proposition 64 did not alter this longstanding liberal amendment policy. (*Branick, supra*, 39 Cal.4th at p. 239.) Particularly important is *Branick*'s reinforcement of the common-sense approach allowing amendment after the law has changed, as occurred here. "[A] rule barring amendments to ***comply*** with Proposition 64 does not rationally further any goal the voters articulated." (*Id.* at p. 241, emphasis in original.)

The panel's rationale for denying leave to amend cannot be reconciled with this controlling authority. The panel first stated that plaintiffs had been "on notice" of the facts they needed to plead due to the existence of prior cases addressing Proposition 64 standing. (*Kwikset Corp., supra*, 171 Cal.App.4th at p. 657.) But the decisions that had construed Proposition 64's standing requirements by the time the SAC was filed (April 2008) had hardly been uniform in their interpretations, as noted in the petition for review.

The panel's statement that "the record fails to support" plaintiffs' proffer of additional facts to support the SAC (*Kwikset Corp., supra*, 171 Cal.App.4th at p. 657) is also misguided, as only the limited record on defendants' writ petition was formally before the Court of Appeal. The true "record" from the 2001 bench trial and other proceedings was much broader, but plaintiffs' proffer – in their return to the petition, at oral argument, and in their petition for rehearing – was improperly ignored. Among other things, plaintiffs proffered they could amend to allege a market differential, the availability of lower-priced alternative locksets, and Kwikset's recognition of

the materiality and economic value of the "Made in U.S.A." label. (See Return 42-43; Rehearing App. Ex. 1; Rehearing Pet. 3-8.)

The panel rejected plaintiff's proffer on the ground it was "supported by evidence not submitted to the trial court [on demurrer] and not contained in the appendix to the petition [for writ of mandate]." (Order denying Rehearing Petition, dated March 18, 2009; see *Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 657.) But the court overlooked that there was no need for plaintiffs to present these facts to the trial court because they had ***prevailed*** on demurrer. (See 3 Exs. 606-608.) Plaintiffs out of necessity made their proffer for the first time on appeal. Also, to the extent the panel suggested leave to amend is conditioned upon a detailed evidentiary showing, it cited no authority for such a proposition and plaintiffs are aware of none. All that is required is a "reasonable possibility that the defect can be cured by amendment." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) As plaintiffs satisfied this threshold, the panel abused its discretion by denying leave to amend. (See *ibid.*)

The panel's failure to allow plaintiffs' proffer of new facts derived from prior testimony was particularly unfair given that the panel cited Benson's testimony to show a purported inconsistency in the allegations regarding his standing (*Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 657) – a reference that, as demonstrated in plaintiffs' rehearing petition, mischaracterized the record. (Rehearing Pet. 11-12.)[8] The panel also ignored that there are three other plaintiffs that can maintain this action.

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[8] The panel's reference to a purported inconsistency in Benson's testimony refers to an argument Kwikset made unsuccessfully twice in the trial court and which Kwikset also made unsuccessfully in two writ petitions seeking to overturn the trial court's rulings. (2 Exs. 209-230, 232-233; Order in *Kwikset Corp. v. Superior Court* (December 26, 2007, No. G039685); 2 Exs. 235-254, 360-381; 3 Exs. 382-385; Order in *Kwikset Corp. v. Superior Court* (March 10, 2008, No. G039972); 3 Exs. 533.) As plaintiffs had

Curiously, the Court of Appeal also believed amendment to be inappropriate because "this case has already been through trial." (*Kwikset Corp., supra*, 171 Cal.App.4th at p. 657.) If anything, this fact militates in favor of amendment, not against it. Plaintiffs prevailed at trial, and amendment should be allowed to preserve the judgment for consumers and businesses, rather than denied to void the judgment to defendants' benefit.

The court's conclusion also overlooks that this action was tried under different rules than exist now. Although the original plaintiff requested restitution of the purchase price of the locksets or the amount of Kwikset's savings and foreign expenditures, he neither sought nor attempted to prove a monetary remedy based on a market premium due to the "Made in U.S.A." misrepresentations. (Rehearing App. 69-71.) This would have constituted damages, unavailable under the UCL and FAL, and unnecessary at the time to establish standing. After balancing the equities, the trial court declined to order restitution to consumers because "such an order would be neither necessary nor appropriate to assure compliance with the law." (2 Exs. 275.) There is, consequently, no basis for the panel's apparent belief that the original trial foreclosed the possibility of proving damages. It simply was not an issue in the case at the time.

Indeed, the fact that Proposition 64 came along, changed the rules, and was held applicable to pending cases like this one, is all the more reason to be generous with amendments seeking to satisfy the new standing rules. (See

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explained to the trial court, Benson had previously testified he had not purchased Kwikset's locksets for himself based on his understanding that the questions referred to locksets purchased for his own "home." Benson had never owned a home, and it did not occur to him at the time to consider locksets he purchased in the past for his rental property. (2 Exs. 334-335.) Plaintiffs explained this to the Court of Appeal. (Rehearing Pet. 11). Benson's personal purchases were, of course, irrelevant at the time of his prior testimony, which was prior to the enactment of Proposition 64.

*Branick, supra*, 39 Cal.4th at pp. 239, 241.) To plaintiffs' knowledge, this case was the only UCL case before Proposition 64 that the plaintiff tried, won and successfully defended on appeal – only to see the judgment undone by a change in the law over which he had no control. The full extent of Proposition 64's impact on UCL jurisprudence is unsettled to this day. These circumstances caution against tossing this case out of court before plaintiffs have had a full and fair opportunity to meet the new standing requirements as interpreted by this Court, in the event it is determined the SAC does not already do so.

## IV. CONCLUSION

The complaint before this Court easily passes muster under Proposition 64. Accordingly, plaintiffs respectfully ask the Court to reverse the judgment of the Court of Appeal and remand with directions to enter an order summarily denying defendants' petition for writ of mandate. To the extent the complaint is held deficient, plaintiffs respectfully ask this Court to reverse the judgment of the Court of Appeal and remand with directions to allow plaintiffs to file an amended complaint in the trial court seeking to satisfy the guidelines announced in this Court's opinion.

DATED: August 10, 2009

Respectfully submitted,

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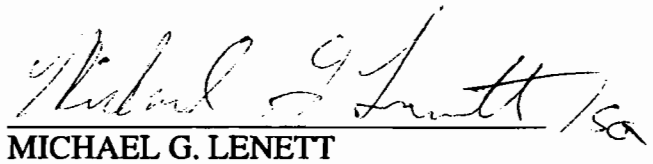
## CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rule 8.204(c)(1) of the California Rules of Court, the enclosed **OPENING BRIEF ON THE MERITS OF REAL PARTIES IN INTEREST** is produced using 13-point Roman type, including footnotes, and contains approximately 12,217 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count provided by Microsoft Word word-processing software.

DATED: August 10, 2009



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**DECLARATION OF SERVICE BY MAIL**

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on August 10, 2009, declarant served the **OPENING BRIEF ON THE MERITS OF REAL PARTIES IN INTEREST** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this tenth day of August, 2009, at San Diego, California.

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