SUPREME COURT COPY

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

REPLY BRIEF ON THE MERITS OF REAL PARTIES IN INTEREST

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Service on Attorney General and District Attorney Required by Bus. & Prof. Code, § 17209

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I. INTRODUCTION

The issue before the Court concerns the proper interpretation of the standing requirement, added by Proposition 64 to the Unfair Competition Law (UCL), California Business and Professions Code, section 17204, and the False Advertising Law (FAL), California Business and Professions Code, section 17535, that a plaintiff show he has "lost money or property as a result of" unfair competition. Plaintiffs demonstrated in their Opening Brief that under this Court's controlling analytical framework for deciding statutory construction issues, plaintiffs readily satisfy Proposition 64's standing requirements. Defendants, on the other hand, have filed an Answer that is notable for its avoidance of many of plaintiffs' principal arguments.

Proposition 64, by its plain language, confers standing on a person who has "lost money or property" having some connection to the defendant's wrongful conduct. As the Second Amended Complaint (SAC) alleges, plaintiffs were deprived of money they paid for defendants' products as a result of defendants' unlawful conduct. They paid money for a product advertised as one thing, but received a product that was something else. Plaintiffs also allege they purchased defendants' locksets in actual reliance on defendants' false "Made in U.S.A." advertising and, therefore, easily satisfy the "as a result of" requirement under all of the prongs of the UCL, as well as under the FAL. 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.)

Plaintiffs demonstrated how defendants' proposed interpretation of "lost money or property" – which would require every UCL plaintiff to prove entitlement to restitution just to maintain standing – conflicts with the plain meaning of the statutory language, the "as a result of" requirement, the

initiative's stated purposes, and the ballot materials. Plaintiffs also explained the distinctions between UCL standing and the available remedies under that statute, as well as the severe logistical and case management problems posed by the standing test defendants urge. For the most part, defendants make no effort to explain or rebut these flaws in their analysis. Instead, defendants attempt largely to divert focus away from these considerations and onto others that are either unsupportable under established tenets of statutory interpretation, or are irrelevant to the issue before the Court.

For example, defendants' argument that an "actual monetary loss" exists only if, in addition to the false advertisement, plaintiff can also allege some defect that negatively affects the product's market value (such as one concerning functionality, operation or quality), violates the most basic principles of statutory construction. It has no textual basis in the initiative or in the ballot materials. Moreover, defendants' contention that just to obtain standing a plaintiff must prove entitlement to restitution improperly conflates standing with relief. It would effect a fundamental change in substantive UCL law that would thwart both the Legislature's and the voters' intentions to preserve the UCL as a vital tool for protection of consumers and businesses. Such a requirement, among other things, would undo longstanding precedent recognizing injunctive relief as an ***independent*** remedy under the UCL and would drastically curtail the availability of that remedy even though this Court has described it as the "primary form of [UCL] relief." *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 319 (*Tobacco II*).

Defendants' other arguments also fail to inform the important issue before the Court. Their entire discussion of how UCL restitution should be defined – as an "out-of-pocket" or "benefit of the bargain" measure – is beside the point. Regardless of how restitution is defined, nothing in Proposition 64 or its ballot materials conditioned standing upon proving entitlement to relief. Similarly, defendants' suggestion that plaintiffs' plain meaning construction of

Proposition 64 would automatically entitle any UCL plaintiff to recover his or her entire purchase price in every case where liability is established is another red herring. Plaintiffs are not making any such claim. Plaintiffs contend only that "lost money" within the ordinary meaning of those words is enough for standing, assuming the injury-in-fact and causal nexus requirements are met. Whether a court awards restitution and how much is not an issue pertaining to standing; it is an issue pertaining to the relief that is appropriate in any given case, and that is a matter subject to its own set of standards.

More fundamentally, however, it is not necessary to equate standing with restitution to establish "lost money" and further the stated goals of Proposition 64. Based on the compelling evidence plaintiffs presented, the trial judge, now an appellate justice, found that these defendants competed unfairly in the marketplace and sold millions of products to California consumers advertising them to be something they were not, in violation of the specific "Made in U.S.A." statute the Legislature placed in the false advertising law. The fact is that defendants, over the course of five years, made over $95 million inducing consumers to buy their products by labeling them "All American Made" and "Made in U.S.A." notwithstanding that they closed a manufacturing plant in Anaheim, California, opened a plant in Mexicali, Mexico, outsourced over 12% of Kwikset's entire workforce to Mexicali to assemble the heart of their locksets (the locks themselves), saved tens of millions of dollars due to lower foreign labor costs not enjoyed by their competitors employing American workers, and imported over fifteen lockset parts from four foreign countries.

In enacting Proposition 64, the voters struck a balance designed to deter frivolous cases while protecting meritorious ones such as this case. The interpretation of the "lost money or property" standing requirement adopted by the Court of Appeal and urged by defendants would not only eliminate the judgment and relief ordered in this case; it would tip the balance too far to the

side of eliminating private unfair competition suits altogether – contrary to the voters' intent. It would erode protection of California consumers and businesses to an extent not even remotely expressed by or explained to the voters.

II. ARGUMENT

A. Plaintiffs Sufficiently Alleged They Lost Money as a Result of Defendants' Unfair Competition

1. The Plain Language of Proposition 64 Does Not Require a Victim of False Advertising to Plead and Prove Market Damages or Unrelated Product Defects for UCL Standing

Defendants contend Proposition 64 requires a plaintiff to allege facts establishing what they call an "actual monetary loss" resulting from the alleged UCL violation. (Answer Brief on the Merits (Answer) 2-3, 18-29.) According to defendants' definition of their own term, an "actual monetary loss" does not include money a consumer loses when, as a result of unlawful, unfair, or fraudulent advertising, she pays for a product that is not what was advertised or what she wanted. Instead, according to defendants, an "actual monetary loss" exists only if, in addition to the false advertisement, plaintiff can also allege some product defect, such as one concerning the product's functionality, operation, or quality, that negatively affects the market value of the product. (Answer 2-3, 18-29.) This contention, merely restating the Court of Appeal's rationale, is without merit.

Defendants' argument finds no support in the initiative's language. Defendants adopt terms that are not in Proposition 64, and seek to imbue the initiative with a particular technical or economic definition that is very different from the ordinary meaning of the initiative's actual terms. Defendants do not point to any language in the initiative or ballot materials that says anything about product defects or market premiums. (See Answer

18-19.) Nor do defendants argue that the ordinary meaning of the words "lost money or property" encompasses such specific and complex matters.

Defendants fail even to acknowledge the rules of statutory construction that govern the issue here or the precedents cited by plaintiffs pertaining to the governing analytical framework, including *Tobacco II*, *supra*, 46 Cal.4th 298, *Arias v. Superior Court* (2009) 46 Cal.4th 969, and *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223 (*Mervyn's*). (See Opening Brief (Op. Br.), 3-4, 14-15.) Defendants ignore that the plain and ordinary meaning of the term to "lose money" is to be "deprived" of money, as the Court of Appeal initially acknowledged (but then disregarded). (*Kwikset Corp. v. Superior Court* (2009) 171 Cal.App.4th 645, 653 (*Kwikset Corp.*); accord Miriam-Webster's Collegiate Dictionary (11th ed. 2003) p. 736; 3 Exs. 607 [similar definition adopted by trial court].) Since the initiative uses plain and unambiguous language, it should be accorded its common usage meaning, and that should be the end of the matter. (*Tobacco II*, *supra*, 46 Cal.4th at p. 315.)

Defendants' and the Court of Appeal's interpretation of "lost money or property" as requiring a plaintiff to show some defect that affects market value, even if that defect is ***unrelated*** to the falsely advertised characteristic, directly conflicts with the initiative's "as a result of" language. The initiative requires the plaintiff to have lost money or property "as a result of the unfair competition." In this case, the proven unfair competition was defendants' false "Made in U.S.A." claim. The unfair competition did not relate to the products' functionality, operation, or physical quality. The requirement to allege defects or market premiums in addition to the misrepresentation itself that constitutes unfair competition cannot be squared with the plain language of Proposition 64.

2. "Lost Money or Property" Is Not Synonymous with "Money or Property Qualifying for Restitution"

Defendants contend the "lost money" language added to the standing requirements in section 17204 of the UCL must be read synonymously with language referring to restitution in the relief provisions of section 17203. (Answer 21-22, 29.) This argument, however, overlooks at least three key facts.

First, if the proponents of the measure had intended to limit standing to those who qualified for restitution, it would have been an easy matter to have just said so (and to have explained as much to the voters). But defendants identify no such statement or explanation.

Second, defendants' construction would make the availability of injunctive relief dependent on the plaintiff's eligibility for restitution. But Proposition 64 does not say that, the voters were not told that, and section 17203 (like its FAL counterpart, section 17535) refers to the availability of injunctive relief and restitution in the ***disjunctive***, in language left unchanged by Proposition 64. As this Court has noted, UCL plaintiffs may still pursue injunctive relief even if restitution is not sought or recoverable. (*Tobacco II*, *supra*, 46 Cal.4th at p. 319.)

Defendants' interpretation thus would dramatically alter the availability of injunctive relief under the UCL. If UCL standing is available now only for those who qualify for restitution, meritorious cases where injunctive relief may be the only appropriate remedy could no longer be brought. But this is completely inconsistent with this Court's holding that Proposition 64 did not change the substantive nature of UCL liability or its remedies. 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 . . . ." (*Tobacco II*, *supra*, 46 Cal.4th at p.

319.) UCL plaintiffs have always been able to pursue injunctive relief even where restitution is not sought or is not available. (*Id.*; see also *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126 (*Kraus*); *ABC International Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1268-1271 (*ABC*).)

Third, defendants' assertion fails to distinguish between standing and relief and the different language and purposes of, and considerations underlying, sections 17203 and 17204. (See *Tobacco II, supra,* 46 Cal.4th at p. 320 [noting differences between sections 17203 and 17204].) Section 17203 is the UCL remedies provision. It does not refer to "lost money or property." Rather, it provides that the court may make such orders or judgments "as may be necessary" to prevent unfair competition or "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." (Cal. Bus. & Prof. Code § 17203.) Section 17204 is the standing provision, directing that UCL actions may be brought "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Cal. Bus. & Prof. Code § 17204.)

Just as this difference in terminology had significance for the class certification analysis in *Tobacco II*, so too should it have significance here. Standing and relief under the UCL involve wholly different considerations. The issue of standing is a threshold inquiry that considers whether the person bringing the case has a sufficient stake in the outcome to create a live controversy for the court to resolve. (See, e.g., *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439.) On the other hand, whether relief should be awarded – and if so, how much – is an equitable determination made after liability has been established. In awarding restitution, the court considers, among other factors, whether such relief is necessary to deter future violations and foreclose retention by the defendant of its ill-gotten gains.

(*Tobacco II*, *supra*, 46 Cal.4th at p. 320; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267 (*Bank of the West*).)

Defendants fail to explain how such equitable considerations relating to restitution have any place in a standing inquiry (or where, in Proposition 64, the voters imposed such an analysis). A requirement that entitlement to restitution be shown to establish standing would change the UCL standing inquiry from a threshold legal matter to an issue that, for all intents and purposes, could only be finally determined at the end of cases, after the court and the litigants have expended their resources to bring the case all the way through trial. Moreover, in every case, the plaintiff would be compelled to establish restitution regardless of whether he wants such relief or whether it is appropriate relief, just to avoid being ***divested*** of standing after trial. Such a requirement would alter how a UCL case is prosecuted in fundamental ways that were not even remotely explained to the voters.

Accordingly, given the different language and purposes of, and considerations relevant to, the statutes' standing and relief provisions, it would not be "anomalous" to construe these provisions differently, as defendants contend. (Answer 38.) To the contrary, it would be anomalous to construe them to be identical, and in so doing, to wreak havoc on sound judicial administration in the trial courts.

Defendants' view that "lost money" must mean the same thing as entitlement to restitution is based on several decisions from the Second Appellate District, starting with *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798 (*Buckland*). (See *Kwikset Corp.*, *supra*, 171 Cal.App.4th at p. 654; Answer 21-22, 29.) In *Buckland*, the plaintiff, the executive director of an advocacy organization, "incurr[ed] the cost of purchasing each of [the defendant's] products in order to meet the letter of the law to have standing" to pursue a UCL case. (*Buckland*, *supra*, 155 Cal.App.4th at p. 805.) She had no other nexus to the party she sued. The

reason the plaintiff in that case did not allege standing, therefore, was because she did not comply with the "as a result of" requirement. The panel held the plaintiff did not allege a loss "eligible" for restitution because she purchased the product not as a result of the unfair competition but as a result of her desire to bring a UCL action in the public interest. (*Id.* at pp. 817-818 & fn. 11.) The court emphasized that its "conclusion is limited to the special facts presented here." (*Id.* at p. 818, fn. 11.)

The *Buckland* panel also stated that "[b]ecause remedies for individuals under the UCL are restricted to injunctive relief and restitution, the import of the requirement [to allege "lost money or property as a result of the unfair competition"] is to limit standing to individuals who suffer losses of money or property that are eligible for restitution." (*Id.* at p. 817.) But this statement is dictum as it is entirely unnecessary to the thrust of the court's holding and was made without any independent analysis. The plaintiff did not have standing because she had not been deprived of money as a result of unfair competition; rather, she had caused her own loss voluntarily. That is not the case here. As the trial court found, "[t]he alleged deception caused the plaintiffs 'to buy products [they] did not want.'" (3 Exs. 607 [quoting SAC]).

Defendants also cite *Citizens of Humanity, LLC v. Costco Wholesale Corp.* (2009) 171 Cal.App.4th 1 (*Citizens of Humanity*). Without conducting any independent analysis of the UCL or the differences between standing and relief under the statute, the panel in *Citizens of Humanity* simply adopted the *Buckland* dicta as the standing test. (See 171 Cal.App.4th at p. 22, quoting *Buckland, supra*, 155 Cal.App.4th at p. 817.) The panel found plaintiff's alleged loss of goodwill insufficient to confer standing because it was not a loss "of the type that would be subject to a restitution order." (*Ibid.*) Although the court relied on the incorrect dictum in *Buckland*, its actual holding, like that in *Buckland*, is consistent with a plain reading of the

initiative. The plaintiff did not allege it was deprived of any money or property as a result of the defendant's conduct, only that it lost goodwill.[1]

Defendants' reliance on *Walker v. USAA Casualty Ins. Co.* (E.D. Cal. 2007) 474 F.Supp.2d 1168 (*Walker*) also is misplaced. In *Walker*, the district court determined the words "lost money or property" in section 17204 had to be given the same definition as money or property eligible for restitution in section 17203. (See *Walker, supra*, 474 F.Supp. at p. 1172.) But the court based its conclusion on a faulty premise – that the term "lost money or property" had already been defined under the UCL, in connection with restitution, and therefore the voters must be "presumed" to have intended the same meaning in enacting the new standing provision. (*Ibid.*, relying on *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149 (*Korea Supply*) and *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177 (*Cortez*).) The federal court failed to recognize that California courts had not previously defined the term "lost money or property," even for purposes of restitution, and that the standing and relief sections have different language and purposes.

Another federal court rejected the rationale of *Walker* for these reasons. In *G&C Auto Body, Inc. v. GEICO General Ins. Co.* (N.D. Cal., Dec. 12, 2007, No. C06-04898 MJJ) 2007 U.S. Dist. Lexis 91327 (*G&C*), the district court found the plaintiffs sufficiently alleged "lost money or property" for standing, notwithstanding that the losses alleged were ineligible for restitution.

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[1] Defendants cite a third decision of the Second Appellate District, *Yabsley v. Cingular Wireless, LLC* (2009) 176 Cal.App.4th 1156, 1166. But that case was recently depublished when this Court granted review, and is thus no longer citable. (*Yabsley v Cingular Wireless LLC*, No. S176146.)

(*G&C, supra*, 2007 U.S. Dist. Lexis at pp. **11-13.)[2] In rejecting *Walker*, the court correctly concluded on its own review of this Court's decisions in *Korea Supply* and *Cortez* that they included "no express discussion or definition of the phrases 'lost money or property' or 'loss of money or property.'" (*Id.* at pp. **12-13.) The court also noted the key differences between section 17203's wording authorizing restitutionary relief and 17204's "lost money or property" standing requirement. (*Ibid.*) The district court concluded that there is "no basis to presume that the People of California, when adopting Proposition 64, meant for the new Section 17204 standing requirements to track the requirements established for obtaining restitution under Section 17203 set by *Korea Supply, Cortez* and their progeny." (*Ibid.*)

Defendants also rely on *Chavez v. Blue Sky Natural Beverage Co.* (N.D. Cal. 2007) 503 F.Supp.2d 1370 (*Chavez*), which they note is "a case analogous to this one." (Answer 24.) In *Chavez*, plaintiff purchased defendant's Blue Sky beverages due to their false advertisement as made in New Mexico (which also included Southwestern Native American tribal bands and pictures of the mountains bordering Santa Fe). The district court dismissed the UCL and FAL claims for lack of standing because the plaintiff had not alleged he paid a market premium for the products. (*Chavez*, 503 F.Supp.2d at pp. 1373-1374.) However, defendants overlook that the Ninth Circuit Court of Appeals ***reversed*** the district court's decision. (*Chavez v. Blue Sky Natural Beverage Co.* (9th Cir. June 23, 2009) 2009 U.S. App. Lexis 13496.) The Ninth Circuit found the district court misread the standing requirements and that Chavez sufficiently alleged a loss of money he paid as a

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[2] The plaintiffs alleged only unpaid accounts receivable and lost business, which were losses amounting to a "contingent expectancy of payment from a third party" that the court found were ineligible for UCL restitution. (*G&C, supra*, 2007 U.S. Dist. Lexis 91327, at p. **7-8.)

result of the false advertising. (*Id.* at pp. **7-8 ["This is not a situation where, for example, Chavez never even purchased Blue Sky soda"].) Thus, the Ninth Circuit in *Chavez* actually ***rejected*** defendants' argument.

Defendants highlight as additional support the decisions in *Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847 (*Hall*), *Medina v. Safe-Guard Products Internat., Inc.* (2008) 164 Cal.App.4th 105 (*Medina*), and *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583 (*Peterson*). All of these decisions emanated last year from Division Three of the Fourth Appellate District, which also decided this case. For the reasons stated here, to the extent those decisions purport to provide support for the panel's holding here that one must be entitled to restitution (or must be able to allege market premiums or product defects, even if unrelated to the claimed unfair competition) in order to have UCL standing, they too were wrongly decided.

Moreover, these cases are readily distinguishable. In *Hall*, it was alleged that Time induced consumers to purchase books by offering a "free preview period" that it had no intention of honoring. (158 Cal.App.4th at p. 850.) Plaintiff Hall ordered a book he wanted and kept it, without paying for it during the free trial period but paying for it later when he received an invoice. (*Id.* at p. 851.) Unlike defendants' locksets, the book itself was precisely as it was represented to be. Applying the ordinary dictionary meaning of "lost" money (*i.e.*, "to suffer deprivation of" money), which it did ***not*** do in this case, the panel found the plaintiff did not lose money because he did not allege he did not want the book he received, and thus was not "deprived" of money. (See *id.* at pp. 853, 855, 857.)

Ironically, as the trial court here recognized (and defendants ignore), plaintiffs would have had standing under the reasoning in *Hall*. (3 Exs. 607.) Plaintiff Hall ordered and received the book he wanted at the price he wanted, did not allege he was deceived by Time's "free trial period" offer, and did not allege he paid for the book due to Time's representations about the offer.

(*Hall, supra*, 158 Cal.App.4th at pp. 851, 857.) Plaintiffs here, by contrast, have alleged they saw, read, and relied on defendants' "Made in U.S.A." misrepresentations and were deceived into purchasing products they did not want. (3 Exs. 447-449.)

In *Medina*, the plaintiff alleged a UCL claim based on his purchase of what he thought was an unenforceable insurance contract because the seller was not licensed to sell insurance in California. (164 Cal.App.4th at p. 108.) The panel found the plaintiff lacked standing because, contrary to his assumption, his contract ***was*** legally enforceable notwithstanding the seller's unlicensed status. (*Id.* at p. 109.) The plaintiff did not lose money he paid due to the defendant's unlicensed status, did not allege he did not want the policy he received, did not allege he relied on the defendant's licensed status in purchasing the contract, and did not allege he had been deceived by any representation (or that the policy itself was not what it was represented to be). (*Id.* at p. 114.) As with *Hall*, *Medina* is easily distinguished from this case, and plaintiffs here would have had standing under the reasoning of *Medina*.

In *Peterson*, the plaintiff claimed the defendant violated the UCL by keeping for itself a portion of cell phone insurance premiums. (164 Cal.App.4th at p. 1586.) The panel found the plaintiff lacked standing because he did not allege that the defendant made any misrepresentation about the insurance, that he purchased the insurance because of any misrepresentation, or that he received insurance he did not want. (*Id.* at pp. 1591-1592.) Again, unlike the plaintiff in *Peterson*, plaintiffs here have alleged (and proved) defendants made unlawful misrepresentations, they purchased defendants' products because of those misrepresentations, they did not receive the products represented, and they lost money because they purchased falsely advertised products they did not want. Here, unlike the plaintiffs in *Hall*, *Medina*, and

Peterson, plaintiffs paid for advertised products they did not get and got different products they did not want.[3]

3. Defendants' Discourse on What Constitutes Restitution Is Irrelevant to the Issue Before the Court

Defendants urge the Court to adopt the "out-of-pocket" measure of fraud damages set forth in section 3343 of the Civil Code as the measure of UCL restitution. (Answer 1-3, 20-21, 23-26, 28, 30.) Although they mistakenly claim this Court in *Cortez* adopted the "out-of-pocket" damages measure for UCL restitution (Answer 21, 30), they also rely on two fraud cases (Answer 1, 3, 20-21, 23-24, 26). But neither of those fraud cases – *Jacobs v. Levin* (1943) 58 Cal.App.2d Supp. 913 (*Jacobs*) and *Gagne v. Bertran* (1954) 43 Cal.2d 481 (*Gagne*) – concerned the UCL or the issue of standing (or even restitution, for that matter). Both decided that the "out-of-pocket" measure of damages in section 3343 applied to fraud cases. (See *Jacobs, supra*, 58 Cal.App.2d Supp. at pp. 916-917; *Gagne, supra*, 43 Cal.2d at pp. 490-491.)

More importantly, defendants' entire discussion of what constitutes restitution, and of the circumstances under which restitution can or should be awarded (see, e.g., Answer 20-21, 28-30, citing, *inter alia*, *Cortez*, 23 Cal.4th 163) is utterly beside the point. Plaintiffs are not arguing restitution should

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[3] Defendants also rely on an Oklahoma case, *Walls v. American Tobacco Co.* (Okla. 2000) 11 P.3d 626, to support their interpretation of UCL standing. (Answer 27-28.) *Walls*, of course, did not involve the California statutes here or the "lost money" language. It concerned whether a plaintiff had standing as an "aggrieved consumer" to file an action for ***damages*** under an Oklahoma statute based solely on payment for the product. The court found that since "actual damages are a necessary element of a claim" under the Oklahoma statute, mere payment of the purchase price was insufficient for standing. (11 P.3d at pp. 629-630.) Here, actual damages are not an element of plaintiffs' UCL and FAL claims, and the Oklahoma case is therefore inapposite.

have been awarded in this case, and the Court did not grant review to address that issue here. The question presented concerns the meaning of Proposition 64's requirement that for standing, one must have "lost money or property as a result of" the UCL violation.

Defendants are asserting no less than this: to have standing, one must prove that one will ultimately prevail and be awarded restitution. That contention, however, marks an extraordinary departure from UCL jurisprudence and defendants can point to nothing in Proposition 64 or the ballot materials indicating the voters were told this would be the consequence of approving the initiative.

Defendants also overlook that their interpretation conflicts with this Court's holding in *Tobacco II*. In that case, this Court held that the plaintiffs had standing to assert a UCL claim under the "fraudulent" prong so long as they relied on the deceptive advertising to which they were exposed. (*Tobacco II*, *supra*, 46 Cal.4th at p. 328.) The Court did ***not*** engage in the analysis urged by defendants here, and never suggested that the plaintiffs in that case lacked standing because they bought cigarettes that functioned like cigarettes, or because the cigarettes cost no more than their market value.

Furthermore, if, as defendants contend, it were enough to deny standing based on the "value" (Answer 30) of the misrepresented product purchased, or the benefit a UCL plaintiff might have received from obtaining a product with some value for some purpose, then the UCL would virtually never be privately enforced. It would be a simple matter for defendants to defeat UCL actions by requiring each plaintiff to prove by some "benefit of the bargain" analysis that what they parted with had a greater value than what they received or were promised. There would be little to deter companies from engaging in unfair business practices were they permitted to defeat UCL standing merely by showing that consumers received something that had value in some respect apart from the violation.

Regardless of the value of defendants' locksets, plaintiffs here emphatically did not receive the benefit of their bargain. They bargained for products made in the United States and they got products made with substantial foreign content and labor. The trial court so found and defendants did not, indeed cannot, claim otherwise. (2 Exs. 266-272.)

It also is important to note that defendants' interpretation and the ruling below would preclude more than just meritorious false advertising cases under the UCL's "fraudulent" prong. Unless consumers or businesses could allege and prove market premiums and product defects, it would preclude suits alleging "unlawful" and "unfair" business practices as well.[4] Defendants fail to respond to plaintiffs' demonstration (Op. Br. 18-19) that, as confirmed by post-Proposition 64 case law, all that is required under these latter prongs 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.) In *Fireside Bank*, this Court upheld the plaintiff's standing because her van had been repossessed through an unlawful notice and she had attempted to make a post-repossession payment against her loan deficiency. The Court did not undertake any analysis of, for example, whether the plaintiff actually paid more than what she owed. The unlawful repossession notice and her lost money and property were sufficient for standing. (*Fireside Bank, supra*, 40 Cal.4th at p. 1090.) Defendants simply provide no explanation as to how their interpretation of the standing requirements should or could be applied to "unlawful" and "unfair" cases.

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[4] Defendants here violated all three prongs of the UCL. (2 Exs. 255-275.)

4. Defendants' Hypothetical Frivolous Cases Are Inapposite

Defendants seek to sway the Court to jettison the governing rules of statutory construction by positing inapposite and absurd hypothetical cases they claim would result if plaintiffs' interpretation of the standing requirements prevailed. (Answer 34-37.) The fact that defendants are relegated to arguing that the Court should cast aside the ordinary meaning of the initiative's language lest someone file a UCL action complaining they received a $500 diamond ring instead of a $50 cubic zirconia one illustrates how far defendants have strayed from the proper analytical framework.

Defendants' hypothetical cases are nothing like the actual case before the Court and fail to set forth even the basic elements of any prong of the UCL. For example, under the unfair prong, how could either plaintiff allege these mere "mistakes" were unfair? How does the gravity of the inadvertent error far outweigh the utility of the defendant's conduct? Or alternatively, what is the "legislatively declared policy" this inadvertent conduct allegedly violates, and where are the allegations of "some actual or threatened impact on competition?" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 186-187.) In addition, it is not clear how either plaintiff could show "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent" – as is necessary to establish "injury in fact." (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal. 4th 352, 362 (*Associated Builders*) [internal quotation marks omitted].) Finally, because the defendant in both hypotheticals had no idea the mistake had been made, how could the plaintiff allege the necessary elements of section 17500 that the defendant knew or by the exercise of reasonable care should have known that the labeling on these items was untrue or misleading? (Cal. Bus. & Prof. Code § 17500.)

Defendants' hypotheticals are designed to convey the false impression that plaintiffs' definition of "lost money" means that anyone who pays money for a product could bring a UCL case. This, of course, is oversimplified, and yet another diversionary tactic. Plaintiffs, unlike defendants, advocate an interpretation that accords the initiative's words their ordinary meanings, and is consistent with what the voters were actually told and the initiative's stated purpose of protecting meritorious suits. Moreover, plaintiffs are not suggesting the UCL standing inquiry begins and ends with the allegation that one has paid money for a product. (See, e.g., Answer 33.) Defendants' simplistic mischaracterization of plaintiffs' position fails to take into account all the other factors that must be satisfied.

First and foremost, in a false advertising case, the product must not possess the characteristic that it is advertised to have – *i.e.*, defendants falsely represented it to be one thing when it is another. Second, the "as a result of" language, as this Court has found, requires a nexus between the loss of money or property and the defendant's unfair competition. (*Tobacco II*, *supra*, 46 Cal.4th at p. 325.) Further, the defendant's conduct that is connected to the plaintiff's loss must violate one of the three UCL prongs; it must be "unlawful," "unfair," or "fraudulent," as those terms have been defined through decades of case law. The "injury in fact" requirement also added by Proposition 64 requires "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." (See *Associated Builders*, *supra*, 21 Cal.4th at p. 362 [internal quotation marks omitted].) Finally, Proposition 64 provides additional protections against frivolous UCL and FAL lawsuits by requiring class certification for representative actions. (See MJN Ex. 3, §§ 2 and 5, amending Cal. Bus. & Prof. Code §§ 17203 and 17535, respectively.)

While defendants strain credulity with their extreme hypothetical scenarios, they ignore that the interpretation ***they*** propose would eliminate

many more ***meritorious*** UCL and FAL actions (including this one). (See Op. Br. 31). Consider just a few examples of false advertising cases that would be immune from private enforcement under the UCL and FAL if the products did not have a functional or operational defect or quality flaw other than the absence of the misrepresented characteristic, or a market value below the purchase price:

- False advertisement of hot dogs as "kosher" when they are not.
- False advertisement of clothes as "Made by U.S. War Veterans" when they are not.
- False advertisement of a product as being a name brand when it is in fact the store's generic brand.
- False advertisement of detergent as "phosphorous-free" when it is not.
- False advertisement of trash bags as "biodegradable" when they are not.
- False advertisement of fruit and vegetables as "organic" or "natural" when they are not.
- False advertisement of wine as made in "Napa Valley, California" when it is actually made in New Jersey.
- False advertisement of books as being written by a certain author when they actually are the works of a different author. This was the example used by the trial court. (See 3 Exs. 607.)

In each of the foregoing cases, the products may be of acceptable quality, may be suitable for some purposes, and may cost the same as other products having the misrepresented characteristic. In each instance, they are represented as having a characteristic that is important to purchasers, the monetary value of which may be difficult to quantify, but that nevertheless induces consumers to buy that product. Yet none of these cases likely could be brought under the standard adopted by the Court of Appeal and urged by defendants. The wrongdoer in each of these cases would be free to lie about its products with impunity, because only misrepresentations related to the price would be actionable.

Here, defendants exploited the patriotism of American consumers for profit, and violated California's strong public policy to protect consumers and businesses against false "Made in U.S.A." advertising. (See Cal. Bus. & Prof. Code § 17533.7; 15 U.S.C. § 45a.) The interpretation of Proposition 64 urged by defendants would emasculate this policy. But the voters were never informed that private lawsuits under California's principal unfair competition laws would no longer be available to rectify such wrongful conduct. In fact, the proponents reassured voters the initiative would not have such a result. (See *Tobacco II*, *supra*, 46 Cal.4th at p. 324; Prop. 64, § 1 subd. (a), (d), MJN Ex. 3; MJN Ex. 4, p. 2.)

B. Defendants' Assurance that Consumers Have Other Means of Protecting Their Rights Rings Hollow

Defendants assure the Court that the Court of Appeal's interpretation of "lost money" would not preclude all UCL and FAL actions because public prosecutors can bring UCL suits without having to satisfy Proposition 64's standing restrictions. (Answer 40.) But this Court just recently reaffirmed that "'consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights.'" (*Tobacco II*, *supra*, 46 Cal.4th at p. 313, quoting *Kraus*, *supra*, 23 Cal.4th at p. 126, footnote omitted.) Expressly rejecting the suggestion that "broad-based actions to enforce the provision of the UCL" are uniquely the province of overburdened public officials, this Court stated: "In the post-Proposition 64 era, as before, [private enforcement] actions continue to 'supplement the efforts of law enforcement and regulatory agencies.'" (*Id.* at p. 317, fn. 11, quoting *Kraus*, *supra*, 23 Cal.4th at p. 126.)

Similarly, defendants' observation to the effect that there's always the CLRA (Answer 39) overlooks the essential and powerful role of the UCL and FAL, with their relaxed standards of liability, expedited processes, and broad scopes, in protecting consumers and businesses from unfair competition. In

enacting Proposition 64, California voters did not intend to render these statutes superfluous. Moreover, in certain significant respects, the CLRA is a ***narrower*** statute than the UCL. Only consumers may sue under the CLRA, thereby excluding business competitors. (Cal. Civ. Code § 1780, subd. (a).) Only conduct in connection with the sale or lease of goods or services for personal, family, or household purposes are subject to the CLRA. (Cal. Civ. Code § 1761, subd. (d).) The CLRA also prohibits only twenty-four specific practices. (Cal. Civ. Code § 1770, subd. (a).)

In any event, nothing in Proposition 64 informed voters that they will have to look elsewhere to remedy wrongs that, as a matter of substantive law, have always been actionable under the UCL. On the contrary, in response to voter concern that Proposition 64 would eliminate many types of actions previously allowed, the proponents touted "Proposition 64 would permit ALL the suits cited by its opponents." (MJN Ex. 3, p. 2.) This Court already has emphasized that 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.) Moreover, to read into the measure the language defendants' propose "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. (*Id.* at p. 321.)

Finally, defendants assure this Court that consumers who have suffered a loss under ***their*** definition would still be able to bring UCL actions. (Answer 39.) In doing so, defendants miss the point that their interpretation not only would preclude meritorious UCL cases in which the plaintiff cannot show an unrelated product defect and market premium, it also would preclude meritorious cases ***even when they can***. The expense, resources, and

complexities involved in establishing product defects and market differentials would be prohibitive. (See Op. Br. 32-33.)

C. Defendants' Continued Denials of the Merits and Benefits of This Action, Even in the Face of the Proof at Trial, Highlights the Importance of Maintaining the Judgment and Relief Order Against Them

Defendants' assurances also ring hollow given that they would erect a standing barrier that would block even a UCL case such as this, where a trial has established the defendants' extensive violations and relief has been ordered to protect consumers and businesses and deter others from similar wrongdoing. Despite this Court's recent affirmation that the UCL "focus[es] 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) and that voters were guaranteed the initiative would not undermine such UCL protection (*id.* at p. 321), defendants claim "Proposition 64 was intended to stop proposed class actions, like this one, where the only potential beneficiaries are the plaintiffs' attorneys." (Answer 40.) The fact that defendants are still in denial about their wrongdoing here, even in the face of the trial establishing their liability, and continue to trivialize the Legislature's strong policy against false "Made in U.S.A." advertising, underscores the importance of maintaining the trial court's judgment and relief order.

Throughout their Answer, defendants continue to re-argue the merits, despite the fact that they lost these arguments both in the trial court and on appeal – and cannot re-try those factual issues if standing is sufficiently alleged. For example, they repeat their eight-year-old claims that their locksets contained only "a few foreign-made screws and/or a foreign-assembled latch component," that their "mislabeling" was "minor," and that they "did not intend to mislead consumers." (Answer 1, 2, 5, 40, 41, 44.) All

of these statements were proved ***false***, and therefore may mislead this Court.[5] Defendants also deny the benefits of this case notwithstanding the trial court's findings – which also cannot be re-tried if standing is sufficiently alleged – that the remedial relief ordered is necessary to prevent defendants' continued unfair competition, vindicates an "important right," and confers a "significant benefit" on the public. (See 2 Exs. 273-275; Rehearing App. at pp. 99-100.)

D. Plaintiffs Should Be Granted Leave to Amend, if Necessary

Defendants' response to plaintiffs' request for leave to amend – should amendment be necessary at all – is simply to parrot the Court of Appeal's reasoning and their own entirely unsubstantiated contention that no plaintiff named in the SAC can amend without misrepresenting the facts. Kwikset fails, however, to address any of plaintiffs' responses to these assertions, and

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[5] Twenty-five of defendants' lockset product lines were found to be illegally advertised. (2 Exs. 268-269, 271-273.) The evidence showed these products were made with over fifteen foreign-made parts from four other countries. (See Appendix Supporting Real Parties in Interest's Petition for Rehearing (Rehearing App.) 108-111 [distilling trial evidence].) The evidence also showed, inter alia, that Kwikset closed its Anaheim plant, opened one in Mexico, received NAFTA assistance for the displaced American workers, transferred up to 12.3% of its entire workforce to its Mexicali plant to make the main latch mechanism, received the latches back, put them into the locksets, and then placed the locksets into packages labeled "All American Made" and "Made in U.S.A." (Rehearing App. 108-113 [distilling trial evidence], 11, 17, 22 [Black & Decker document, Trial Exhibit 81], 89 [showing admitted into evidence]; 1 Exs. 102-103 [NAFTA Certification]; 3 Exs. 451 [SAC].) Moreover, the evidence showed that Kwikset intentionally used the "Made in U.S.A." label as a "key feature" of its "branding" to "stimulate[] sales" due to the label's importance to consumers. (Rehearing App. 29 [Trial Exhibit 81], 81-86 [trial testimony of Carol Connolly], 87-90 [trial testimony of Betty Kinney], 94-96 [trial testimony of Norman Judd], 52-54 [his deposition shortly before trial].) The trial court found under the FAL that defendants knew or should have known that their "Made in U.S.A." advertising was false or misleading. (2 Exs. 272; Cal. Bus. & Prof. Code § 17500; see also 3 Exs. 455-456 [SAC].)

ignores the abundant legal precedent supporting amendment, if necessary, in this case.

First, defendants maintain there was plenty of law informing plaintiff of the factual allegations necessary to maintain standing. (Answer 45.) But they completely disregard the reality – explained by plaintiffs in detail in their Petition for Review and Opening Brief – that the nature of the factual allegations necessary for standing in a UCL false advertising case were at best unsettled at the time plaintiffs filed the SAC. (Op. Br. 35; Petition 22-26.) Notably, defendants have never responded to plaintiffs' observation that plaintiffs' existing allegations ***would have been sufficient*** even under some of the cases both defendants and the Court of Appeal have cited as previously setting the correct standards. (Petition 24, citing *Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847 and *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136.) Indeed, defendants fail to explain why, if the standards were as crystal clear as they suggest, the trial court overruled their demurrer and this Court granted review here.

Second, defendants fault plaintiffs for not putting before the Court of Appeal sooner the record facts that could further bolster standing. Defendants say this should have been done when plaintiffs filed their Return to defendants' last writ of mandate. (Answer 46, fn. 18.) But plaintiffs ***did*** make an offer of proof in their Return that they could amend the SAC. (Op. Br. 36; Return 42-43.) Defendants further ignore that the trial court overruled their demurrer. Defendants fail to cite any case requiring a plaintiff to make a proffer of new facts on appeal, before the appellate court's ruling, where the trial court has upheld the complaint.[6]

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[6] The decision cited by defendants, *Reynolds v. Bement* (2005) 36 Cal.4th 1075, is easily distinguished. In that case, unlike here, the trial court ***sustained*** the demurrer with leave to amend, but plaintiff chose not to amend – thus

Moreover, the law in California is settled that amendment may be allowed at any time, even after appeal, if the circumstances warrant. (See, e.g., *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746.) Amendment is particularly appropriate after the highest court in the state has clarified or modified the applicable legal standards. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 241 (*Branick*).) Again, defendants have no response to this well-established precedent.

Third, defendants complain that plaintiffs "treat[ed] pleading like a game of darts" when they proffered record facts showing they could satisfy one or more of the Court of Appeal's newly-articulated standards. (Answer 47.) If that is the case, then it was the Court of Appeal that set up the dart board. That court held that plaintiffs, to obtain standing, had to allege a complaint about ***any*** of the following: "the cost, quality, or operation of the misrepresented locksets." (Op. 11.) Plaintiffs merely demonstrated with record facts how they could satisfy one or more of those requirements. Furthermore, to suggest, as defendants do, that plaintiffs were forcing the Court of Appeal to "figure out" how the complaint could be amended (Answer 47) is patently wrong. In their Petition for Rehearing, plaintiffs detailed specific facts that could be used to amend the complaint. (Rehearing Pet. 6-8.) No guesswork on the Court of Appeal's part was necessary; that court simply declined even to consider the proffer.

Finally, defendants stubbornly adhere to their contention that plaintiff Benson's prior testimony shows he can make no allegations sufficient to meet the Court of Appeal's standards. (Answer 46.) Plaintiffs already have demonstrated how the Court of Appeal misapprehended the record as to

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effectively conceding he already had stated as strong a case as he could. (*Id.* at p. 1091.) Under those circumstances, which do not exist here, this Court concluded plaintiff had forfeited his right to further amendment. (*Ibid.*)

plaintiff Benson's testimony. (See Op. Br. 36 fn 8.) But that aside, defendants ignore the three other plaintiffs who could satisfy the Court of Appeal's standing test. That silence speaks volumes.

In sum, amendment should be permitted here if this Court determines the existing complaint is deficient in any respect regarding standing. Consistent with decades of California jurisprudence, this Court has been liberal in granting opportunities to amend in recent UCL cases, in light of the still-evolving law regarding the scope and meaning of Proposition 64. (See *Branick, supra*, 39 Cal.4th at p. 239.) Defendants have identified no reason why that policy should not be applied here.

III. CONCLUSION

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.

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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 **REPLY BRIEF ON THE MERITS OF REAL PARTIES IN INTEREST** is produced using 13-point Roman type, including footnotes, and contains approximately 8,205 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: November 20, 2009

PAMELA M. PARKER
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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 November 20, 2009, declarant served the **REPLY 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 twentieth day of November, 2009, at San Diego, California.

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