No. S_____

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

PETITION FOR REVIEW

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I. ISSUES FOR REVIEW

A. 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?

B. Are the new standing requirements satisfied in a false advertising case where plaintiffs allege that as a result of defendant's 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? (Opinion (Op.) 9.)

C. 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?

II. INTRODUCTION

This Court may grant review "to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) Review is warranted here for both reasons.

This case appears before the Court for the second time, having previously been accepted for grant-and-hold review pending the decisions in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223 (*Mervyn's*), and *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235 (*Branick*). Plaintiffs now respectfully ask this Court to review and reverse the February 25, 2009 published decision in this matter of Division Three of the Fourth Appellate District. Issuing a writ of mandate, the appellate panel vacated the trial court's order overruling defendants' demurrer, nullified the pre-Proposition 64 judgment on the merits in plaintiffs' favor, and dismissed plaintiffs' post-initiative Second Amended Complaint (SAC) without leave to amend.

The panel concluded plaintiffs lack standing because they have not adequately pled that they "lost money or property as a result of" defendants' proven FAL violations. The court accepted that plaintiffs had purchased products as a result of defendants' false advertising. Nevertheless, it mandated that consumers deceived by material misrepresentations about a product's origins also must plead (and prove) that the product purchased is defective or otherwise not worth the price paid. In other words, just to get before a court, consumers suing for false advertising must now allege and prove facts that bear no relationship to the claim asserted, and must establish injury and "damages" akin to that required in product defect or certain other tort cases, even though these are not elements of a FAL claim.

This reading of Proposition 64 frankly is derived from whole cloth. It finds no support in the initiative's language or purpose, and contravenes decades of UCL jurisprudence, much of it from this Court. It effectively guts

the important substantive rights that the voters explicitly sought to protect, as well as the ability of consumers to bring private enforcement actions that have long been a bedrock of consumer protection in California. Review is warranted to correct the panel's fundamentally flawed legal analysis, and to protect the continued vitality of the laws safeguarding consumers and businesses from unfair competition and false advertising.

Review is also appropriate in this case, and at this time, because the standing requirements have been the subject of intermediate appellate review for several years, and the body of law that has emerged lacks cohesion and consistency. Allegations that would satisfy the standing requirements in one court have been deemed insufficient in another. The fair and effective administration of justice should not depend on where the lawsuit is filed. Without guidance from this Court, litigants and the lower California courts, as well as federal courts that are now handling UCL and FAL cases with increasing frequency, will continue to struggle over the proper interpretation of these statutes' threshold standing requirements.

Plaintiff James Benson originally filed this action in 2000 on behalf of the general public, which the FAL then allowed. He alleged that defendants Kwikset Corporation and Black & Decker Corporation (collectively, Kwikset or defendants), seeking to exploit the patriotism of American consumers, violated the FAL, the UCL and Business and Professions Code section 17533.7, by falsely labeling their locksets as "Made in U.S.A.," when they actually were substantially made with foreign parts and labor. After a bench trial, the court agreed with Benson, entered judgment in his favor, and awarded injunctive relief and attorney's fees.

The Court of Appeal initially affirmed the judgment in 2004 but then granted rehearing on an ancillary issue and held the case. Proposition 64 was approved while the appeal was pending. On remand after this Court's decisions in *Mervyn's* and *Branick* in 2006, Benson amended the complaint to

add new standing allegations and plaintiffs. Kwikset's initial attempts to undo the judgment and the trial court's subsequent approval of the amended complaint were unsuccessful. Finally, in 2008, Kwikset filed a writ petition urging the Court of Appeal to consider whether the SAC adequately alleged that plaintiffs had "suffered injury in fact and . . . lost money or property as a result of" defendants' illegal conduct. (Bus. & Prof. Code, §§ 17204, 17535.)

Reaching out on a writ to address this question, the same appellate panel that had affirmed Kwikset's liability three times ultimately ordered the case dismissed, without leave to amend, for lack of standing. It concluded that to maintain standing under Proposition 64, it was not sufficient for plaintiffs to allege that as a result of defendants' material misrepresentations, plaintiffs purchased products they did not want (i.e., foreign-made locksets). Rather, plaintiffs also had to allege and prove that the locksets were of inferior quality, did not function properly, or were sold at a premium over non-misrepresented locksets. (Op. 9.) 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 some other complaint about the product's operation or quality having nothing to do with the claimed FAL violation.

The notion that Proposition 64 imported concepts of product defect or other tort-style injury into the standing requirements for a false advertising claim is belied by the language and intent of the initiative and the overall statutory scheme of the UCL and FAL. It flies in the face of this Court's repeated affirmations that these laws do not incorporate the same elements as most tort claims. (See, e.g., *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1146 (*Korea Supply*).) It also disregards this Court's admonition that "[n]othing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted." (*Mervyn's*, *supra*, 39 Cal.4th at p. 232.)

California law today prohibits "untrue or misleading" advertising, just as it did before Proposition 64. (Bus. & Prof. Code, § 17500.) The specific allegations of product defect or price differential required by the panel here cannot be reconciled with the plain language of the false advertising statute, as amended, because those injuries have no relation to the alleged misconduct. Such harm is not incurred "as a result of a violation of" the FAL – i.e., the making of a false statement. (*Id.*, § 17535.) If the panel is correct, false advertising plaintiffs would have to plead and prove, just for standing purposes, far more than they need to plead and prove to establish FAL liability. For this reason, the panel's interpretation of the standing requirements creates a formidable barrier to the courthouse door that few, if any, FAL plaintiffs could hurdle. By the same token, it virtually immunizes a wide variety of illegal conduct that the FAL and UCL were designed to remedy and deter. The panel's rationale provides manufacturers with license to misrepresent their products and reap windfall profits from their false advertising, so long as their products have some utility. Indeed, as a result of the court's decision, Kwikset essentially gets a free pass, notwithstanding its proven violations of law.

That is a result the voters never intended, and in fact, sought to guard against, when they passed Proposition 64. The focused target of the measure were those few Trevor Law-type attorneys who were perceived as abusing the broad standing requirements of the former UCL. The initiative addressed these abuses by requiring UCL and FAL plaintiffs to allege that they have been personally affected by defendants' misconduct. Significantly, the voters explicitly preserved the right of individuals to pursue meritorious claims where they "used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant" (Proposition 64, § 1(b)(3)), and were "injured in fact under the standing requirements of the United States Constitution." (*Id.*, § 1(e).)

Plaintiffs here satisfy these prerequisites, as well as the plain meaning of the statute's language conferring standing on those who "have lost money or property as a result of" the illegal and deceptive conduct. Simply stated, based on defendants' material misrepresentations, plaintiffs spent money out of pocket for a product they did not get, and got a product they did not want. Proposition 64 requires nothing more for private consumer standing to enforce the FAL and UCL.

III. STATEMENT OF THE CASE

A. Pre-Proposition 64: The Case Is Tried on the Merits, Resulting in a Judgment for Benson

Benson filed this action on January 21, 2000, alleging that Kwikset violated the FAL, the UCL, and two statutes independently actionable under the UCL – California's "Made in U.S.A." statute (Bus. & Prof. Code, § 17533.7) and the Consumers Legal Remedies Act (Cal. Civ. Code, § 1770 et seq.) – by illegally marketing their products (locksets) as "Made in U.S.A.," when the merchandise in fact was substantially made with foreign parts and labor. (Volume 1, Exhibits in Support of Petition for Writ of Mandate 91-103 (hereinafter __ Exs. __).)

The parties fully litigated the case, and a bench trial was held in December 2001. On May 23, 2002, the trial judge, the Honorable Raymond J. Ikola (now an appellate justice), issued his Statement of Decision and entered judgment in Benson's favor. Judge Ikola found that Kwikset had violated the statutes with respect to more than two dozen of its products. (2 Exs. 266-273.) The court awarded Benson injunctive relief: (1) prohibiting defendants from mislabeling their locksets, and (2) directing that they notify the commercial sellers of their locksets that they could return any falsely labeled locksets remaining in their inventories for a refund or exchange them for correctly labeled products. (2 Exs. 273-275.) In the exercise of its equitable discretion, the court declined to award restitution to past purchasers of the locksets. (2 Exs. 275.) In its Final Judgment, the court also awarded Benson attorneys' fees. (2 Exs. 278.)

B. Post-Proposition 64: The Court of Appeal Affirms the Merits Judgment, but Remands to Allow Benson to Amend in Light of the New Law

Kwikset appealed the trial court's judgment, and on June 30, 2004, the Court of Appeal issued a 2-1 opinion (with Presiding Justice Sills dissenting) that affirmed the judgment in its entirety. (*Benson v. Kwikset Corporation*

(2004) 120 Cal.App.4th 301 [depublished by grant of rehearing].) The Court denied Kwikset's petition for rehearing, but then granted rehearing on its own motion to review a non-merits ruling concerning certain litigation costs. (See *Benson v. Kwikset Corporation* (July 29, 2004, No. G030956) 2004 Cal. App. Lexis 1274.)

While the Court of Appeal was considering that issue, California voters passed Proposition 64 on November 2, 2004. On November 16, 2004, Kwikset filed a motion with the Court of Appeal to vacate the judgment and dismiss the case, arguing that Benson lacked standing to maintain his claims, as amended by the initiative. In February 2005, the Court of Appeal issued an opinion that again affirmed the correctness of the trial court's ruling on the merits. It nevertheless vacated the judgment based on its conclusion that Proposition 64's changes to the standing requirements applied to this action. (See *Benson v. Kwikset Corporation* (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 plaintiffs' petition seeking review of the ruling that Proposition 64 applied to this action. It deferred further action, and later, 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*. (See *Benson v. Kwikset Corporation* (April 11, 2007, No. S132443) 2007 Cal. Lexis 3728, and *Benson v. Kwikset Corporation* (April 23, 2007, No. S132443) 2007 Cal. Lexis 6537.)

On June 29, 2007, the Court of Appeal issued its opinion reinstating its earlier decision affirming the trial court's judgment in its entirety, but remanding the case for the limited purpose of determining whether the requirements of Proposition 64 can be met. (*Benson v. Kwikset Corporation* (2007) 152 Cal.App.4th 1254, 1266). The court instructed that if those

requirements are 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.)

C. At the Invitation of One Justice, Kwikset Seeks to Undo the Judgment by Focusing Appellate Review on the "Injury in Fact" Standing Requirement

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.) Among other things, the FAC added new plaintiffs, including Al Snook, Christina Grecco and Chris Wilson. (1 Exs. 20-21.) All the plaintiffs, including Benson, alleged that had they known about defendants' misrepresentations, they would not have purchased the locksets. (1 Exs. 19-21.) Plaintiffs sought only the equitable relief already awarded by the trial court. (1 Ex. 28.)

The trial court granted Benson's motion to amend (2 Exs. 209-230, 232-233), and on December 14, 2007, Kwikset petitioned the Court of Appeal for a writ of mandate overturning that order. Two weeks later, the same panel that had affirmed the trial court's judgment months earlier summarily (and unanimously) denied Kwikset's writ petition. (See Order in *Kwikset Corporation v. Superior Court* (December 26, 2007), No. G039685, available at www.courtinfo.ca.gov.)

Immediately thereafter, Kwikset demurred to the new complaint and the trial court promptly overruled their demurrer. (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. One week later, the same panel again denied the petition unanimously. (3 Exs. 533.) This time, however, Presiding Justice Sills essentially instructed Kwikset on how to file a successful writ petition. He wrote separately to express his view that he voted to deny the petition "only because it is not based on the issue of whether plaintiff suffered 'injury in fact,'" an issue that the Presiding Justice stated had

been addressed in the court's recent decision in *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847 (*Hall*), but remained "open for adjudication" in the case before him. (3 Exs. 533-534.)

Taking their cue from Presiding Justice Sills' unusual concurrence, defendants thereafter filed a motion for judgment on the pleadings, seeking dismissal of the FAC on the ground that plaintiff had not sufficiently alleged "injury in fact" as interpreted in the *Hall* decision. (3 Exs. 391-396.) In an effort to address any concerns about the sufficiency of their pleading, plaintiffs sought leave to file the SAC to add further details to their post-Proposition 64 standing allegations. (3 Exs. 426-457).

Specifically, the SAC added allegations 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, plaintiffs alleged that each "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.) Finally, plaintiffs alleged that "[i]n purchasing Defendants' locksets," they 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.) These misrepresentations caused plaintiffs "to spend and lose the money [they] paid for the locksets," and to "suffer[] injury and loss of money as a result of Defendants' conduct adjudicated to be unlawful." (3 Exs. 448-449.)

Plaintiffs' motion for leave to file the SAC was not opposed by Kwikset. The trial court granted the motion on May 15, 2008. (3 Exs. 493-494.) A month later, Kwikset demurred to the SAC, asserting that plaintiffs had failed to allege facts sufficient to demonstrate that they suffered injury in fact and lost money or property as a result of defendants' misrepresentations.

(3 Exs. 506-510.) The trial court rejected those contentions 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. While that petition was pending, the parties engaged in discovery, Kwikset filed its answer to the SAC, and the trial court set a date for trial of the Proposition 64-related issues. Kwikset's petition was again assigned to the same three justices who had considered and resolved the prior appeal and writ proceedings in this case. On August 29, 2008, that panel issued an Order to Show Cause indicating that it would consider the petition, and also stayed the trial scheduled to take place just a few months later.

D. The Court of Appeal Orders the Case Dismissed Without Leave to Amend, Notwithstanding the Proven Violations and Its New Articulation of FAL 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 (notwithstanding Presiding Justice Sills' earlier doubts on that question), because plaintiffs' allegations that they purchased defendants' locksets based on defendants' misrepresentations sufficiently pled the invasion of a legally protected interest. (Op. 9.)

The court held, however, that plaintiffs had failed to adequately allege that they "lost money or property as a result of" the misrepresentations. The panel recognized that plaintiffs alleged "'[d]efendants' . . . misrepresentations caused [them] to spend and lose the money . . . paid for the locksets.'" (Op. 9.) But that is not enough, the court found, because plaintiffs "received locksets in return." (Op. 9.)

> [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 alleged the locksets purchased either were of inferior quality or failed to perform as expected.

(Op. 9.) Without such allegations, the court concluded, plaintiffs have not pled the type of actual economic injury required by Proposition 64. (Op. 9.) Because plaintiffs had not made any complaint about the cost, quality or operation of the locksets, the panel reasoned, they "received the benefit of their bargain," and consequently, have not "lost money or property as a result of" defendants' false representations about the locksets' origins. (Op. 11.)

Finally, even though Kwikset's demurrer had been overruled in the trial court, the appellate panel flatly denied plaintiffs' request for leave to amend. The court rejected outright plaintiffs' offer of proof, both in their return to the writ petition and in their subsequent petition for rehearing, indicating that the trial court record contained facts sufficient to meet the panel's newly-articulated interpretation of the standing rules. (See Op. 13-14; Order Denying Rehearing Petition dated March 18, 2009.)

IV. REASONS TO GRANT REVIEW

A. The Meaning of Proposition 64's Standing Requirements Is a Critical Issue Worthy of This Court's Review at This Time

1. This Case Presents an Ideal Opportunity for This Court to Address Key Unresolved Questions Regarding the Scope of the Initiative's Amendments

After its passage in 2004, Proposition 64 generated an explosion in litigation as the trial and intermediate appellate courts began to wrestle with the scope of the initiative's impact on California's unique consumer protection laws. From the outset, this Court recognized the importance of the legal questions raised by the new law, and has not hesitated to grant review in appropriate cases. Indeed, it previously accepted grant-and-hold review in this case. This controversy now presents, in a compelling factual setting, new and important Proposition 64-related questions warranting this Court's review.

Having determined that the initiative applied to then-pending actions (*Mervyn's*), and that amendments may be allowed to conform pleadings to the initiative's requirements (*Branick*), this Court has turned its attention to the substantive elements of the measure. At issue now is the meaning and scope of Proposition 64's requirement that a UCL or FAL plaintiff must have "suffered injury in fact and lost money or property as a result of" the alleged violation. (Bus. & Prof. Code, §§ 17204 and 17535, as amended.) The Court is poised to issue its decision in *In re Tobacco II Cases*, No. S147345 (concerning whether the amendments include a reliance element and apply to all class members), and is considering *Clayworth v. Pfizer, Inc.*, No. S166435 (concerning, inter alia, whether a person who has recovered overcharges on goods and services from a third person has suffered "injury in fact" and "lost money or property"). The Court also has accepted grant-and-hold review in a number of other cases pending these decisions.

But to plaintiffs' knowledge, none of these cases raises the issue that is directly presented here: Whether a plaintiff seeking to prosecute a false advertising claim satisfies the standing requirements by alleging that he purchased a product he did not want as a result of defendant's material misrepresentations, or whether, as the Court of Appeal here concluded, he must also be able to allege, in effect, tort-style injury and "damages" (i.e., that the product was not worth what he paid for it).[1]

This issue is ripe for review in this case, and at this time, for a number of reasons. First, the lower courts are erroneously interpreting the standing requirements in a manner that compels dismissal of even meritorious UCL and FAL lawsuits – the very types of private actions the voters, in approving Proposition 64, explicitly sought to protect. The preamble to the initiative affirmed that: "This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices." (Proposition 64, § 1 (a).) It went on to declare that it was "the intent of the California voters in enacting this act is to eliminate frivolous unfair competition lawsuits," while still protecting the right of individuals to seek relief for meritorious claims when they have been directly affected by the alleged wrongdoing. (*Id.*, §§ 1(b), (d).) This case falls in the latter category.

As noted previously, this lawsuit was successfully tried to a plaintiff's verdict before the initiative was passed. The trial court found that Kwikset had violated the consumer protection laws and the "Made in U.S.A." statute

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[1] This Court accepted grant-and-hold review in *O'Brien v. Camisasca Automotive Manufacturing, Inc.*, No. S163207, pending the decision in *In re Tobacco II Cases*, No. S147345. Although *O'Brien* also involves false "Made in U.S.A." representations, its facts differ from those here in significant respects, including that the plaintiff in *O'Brien* admittedly did not read or rely upon any of the alleged misrepresentations.

with respect to many of its products. (2 Exs. 266-273.) After a careful balancing of the equities, the court fashioned appropriate injunctive relief. The court did not award restitution, but that was not because the claims were not meritorious. The court simply determined that restitution was not warranted, after weighing all the relevant considerations, including that restitution would be difficult to administer and defendants had already taken steps to correct the unlawful labeling of their products. (1 Exs. 275.)

In sum, this decidedly is not the kind of abusive lawsuit targeted by Proposition 64. Yet, as more fully explained below, by incorporating into the FAL and UCL what amounts to new injury and "damages" elements unrelated to the wrongful practice at issue, the Court of Appeal's decision threatens to dismantle a carefully considered and fully supported remedy to correct defendants' clear-cut violations of law and deter future wrongdoing. Further compounding this error, and in violation of the longstanding precepts affirmed in *Branick, supra*, 39 Cal.4th 235, the panel unjustifiably denied plaintiffs any opportunity to preserve the favorable judgment by amending their complaint to add allegations sufficient to meet the court's new (albeit incorrect) legal standard. Put another way, the Court of Appeal has immunized Kwikset's proven violations, even though the voters sought to protect meritorious actions like this one in approving Proposition 64. Even worse, the court's published opinion has set a dangerous precedent that other defendants who have violated the FAL and UCL may use to escape liability with impunity.

Second, the issues presented here have been working their way through the trial and intermediate appellate courts from the time of the initiative's passage over four years ago. As detailed here, the lower courts have been unable to reach consensus on what it means to "los[e] money or property as a result of" the alleged FAL or UCL violation, or on the interplay between that requirement of the initiative and the "injury in fact" test. This lack of consistency is an independent reason warranting review. (See § IV.B, *post.*)

It also highlights that the "lost money or property" language has been and will continue to be a central focus of Proposition-64 related litigation, and that the time has come for this Court to provide guidance on the subject.

A third factor demonstrating the importance of this issue and militating strongly in favor of review is the extent to which the federal courts are now interpreting Proposition 64's standing requirements as a consequence of the Class Action Fairness Act of 2005 (28 U.S.C. § 1332 et seq., as amended) (CAFA). Under CAFA, class actions alleging UCL or FAL claims are increasingly being filed with (or removed to) the federal district courts. In the absence of controlling guidance from this Court on scope and meaning of the initiative's standing requirements, the federal courts have had to "guess" how the Court would rule on those issues. As illustrated below (§ IV.B, *post*), federal judges, like their state court colleagues, have adopted varying approaches to these inquiries, which has only added to the unsettled, confusing body of law that now exists. These federal decisions are then often cited by the state courts (as they were here), further clouding the jurisprudence. Because of the increasing role of the federal courts in overseeing UCL and FAL class actions, input from this Court is now more critical than ever.

2. The Court of Appeal's Ruling Is Inconsistent with This Court's Precedent and Basic Rules of Statutory Construction

To deter perceived abuses of the broad protections provided under the UCL and FAL as then constituted, the voters, in approving Proposition 64, changed the standing rules to require that those bringing such claims demonstrate that they were personally affected by the wrongful conduct. (See Proposition 64, §§ 1(b), (e).) Notably, however, the voters left undisturbed the law's prohibitions against "unlawful," "unfair" and "fraudulent" business practices, and false advertising. (See Bus. & Prof. Code, §§ 17200, 17500.)

As this Court observed: "The measure left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a

business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted." (*Mervyn's, supra*, 39 Cal.4th at p. 232.) This Court has also recognized that Proposition 64 did not change another fundamental feature of these laws – that "'restitution is the only monetary remedy expressly authorized'" by the statutes. (*Korea Supply, supra*, 29 Cal.4th at p. 1146, citation omitted.) "Now, as before, no one may recover damages under the UCL." (See *Mervyn's, supra*, 39 Cal.4th at p. 232.)

The Court of Appeal, however, acknowledged none of this precedent. Instead, the panel held that, to sufficiently plead "lost money or property as a result of" defendants' illegal labeling of the locksets, plaintiffs had to allege more than payment of money resulting from defendant's misconduct. They had to allege specifically that the locksets were of inferior quality, were defective, or cost more than non-misrepresented locksets. (Op. 9.) According to the court, plaintiffs cannot establish "actual economic injury" of the type the court deemed necessary to maintain standing because they cannot allege and prove that what they actually received was of a lesser quality or market value, measurable in dollars, than what they thought they had paid for. (Op. 9-10.) Because plaintiffs wanted locksets, and got locksets, and made no other "complaint about the cost, quality or operation of the mislabeled locksets they purchased," the court concluded that they "received the benefit of their bargain." (Op. 9, 11.) This formulation ignores that plaintiffs did not get the locksets they paid for – ones made in America. Moreover, neither the language of nor the intention behind the new standing requirements supports the panel's interpretation.

The Court of Appeal correctly recognized that its task in determining the meaning of "lost money or property" was to discern the intent of the voters, first by looking to the language used and "'giving the words their ordinary meaning.'" (Op. 7, citing *Professional Engineers in California*

Government v. Kempton (2007) 40 Cal.4th 1016, 1037 (*Professional Engineers*.) The panel observed that the ordinary dictionary meaning of "to lose" is "'to suffer deprivation of,'" and "loss" means an "'undesirable outcome of a risk; the disappearance or diminution of value, [usually] in an unexpected or relatively unpredictable way.'" (Op. 9, quoting *Hall, supra*, 158 Cal.App.4th at p. 853, citations omitted.)

The court, however, did not follow through on this analysis, for if it had, it would have reached a different outcome. Plaintiffs here suffered an "undesirable" and "unexpected" outcome, and the loss of value (i.e., money), because they were deceived by defendants into purchasing a product they thought had been manufactured in America – a feature that was material to their purchase. But the product they actually received was not the one they wanted. Proposition 64 sought to protect these types of plaintiffs – namely, individuals who were directly affected by defendant's misconduct because they "viewed" and relied upon "the defendant's advertising," got a product they did not want, and lost money out of pocket as a result. (Proposition 64, § 1(b)(3).)[2]

The panel went badly astray when it tacked on additional pleading requirements for standing purposes that bear no relation to defendants' illegal conduct. Standing is what shows the court that 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.) The allegations of the SAC are more than sufficient to establish these plaintiffs'

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[2] Although these plaintiffs are able to allege that they both saw and relied on defendants' misrepresentations, and suffered actual injury as a result, plaintiffs do not concede that reliance and causation have become required elements of all UCL and FAL claims after Proposition 64. Those issues are being addressed separately by this Court in other cases, such as *In re Tobacco II Cases*, No. S147345.

personal stake in the outcome of this case because they demonstrate that plaintiffs were directly impacted 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 additional allegations required by the Court of Appeal – whether the products plaintiffs received were defective, functioned properly, or had a lesser market value than the ones they wanted – simply have no place in this analysis. 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*, *supra*, 29 Cal.4th at p. 1151.) Nothing in the language of Proposition 64 changed the underlying elements of UCL and FAL ***liability***, as this Court has observed. (*Mervyn's*, *supra*, 39 Cal.4th at p. 232.) Moreover, the Court of Appeal's view of the initiative's requirements – that standing now can ***only*** be maintained where the plaintiff has demonstrated that the value of what was paid is greater than the value of what was received – closely tracks the typical measure of damages in tort cases, yet such compensatory damages have never been, and still are not, available under the UCL and FAL. (*Ibid.*)

Proposition 64 changed only one of these laws' unique features – the "private attorney general" plaintiff. Although the interests that have long lamented the broad scope of UCL and FAL liability may have hoped for a more dramatic overhaul of that statute, that is ***not*** what they told the voters Proposition 64 would accomplish. Voters were assured that private actions would be preserved so long as the plaintiff was personally affected and had standing sufficient to satisfy the U.S. Constitution. (Proposition 64, §§ 1(a), (c).) Moreover, nothing indicates the voters remotely intended to demand so

much at the pleading stage and before discovery – in effect, a mini-trial on standing – just to get into court at all.

If the Court of Appeal's formulation is correct, then Proposition 64 will have turned out to be a Trojan Horse – innocent enough on the outside, but concealing dangers and destruction within. "Lost money and property" has a plain and ordinary meaning that readily encompasses what happened to plaintiffs here – paying money out of pocket for a product advertised as one thing, but receiving a product that was something else. The Court of Appeal, however, has twisted the meaning of that language beyond all recognition, to mandate that plaintiffs suing for false advertising allege and prove, just for standing purposes, injury of a type that did not occur "as a result of" the alleged illegal conduct (false statements), and that, in any event, could not be remedied in such cases as they would be in the typical tort case, with compensatory damages.

The rules of statutory interpretation do not permit appellate courts to do such violence to the text of a voter initiative, as the Court of Appeal did here. As this Court has recognized, "we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

3. The Court of Appeal's Decision, if Left Intact, Will Eviscerate California's Vital Consumer Protections

With this decision, it is no exaggeration to say that the future of the UCL and FAL is at a vital crossroads. If allowed to stand, the decision here will largely write private enforcement out of these laws, and thereby eliminate what California voters recognized as a vital tool of consumer protection.

As this case illustrates, the panel's interpretation of the rule that the plaintiff must have "lost money or property as a result of" the false advertising or unfair competition would deny consumers standing to pursue even

meritorious cases. Private consumer actions where restitution might not, in the final analysis, be an appropriate remedy would be dismantled even though liability has been proven and injunctive relief is available. In essence, the court has provided unscrupulous businesses with a license to lie about their products, so long as what they provide to consumers is similar in quality and function to what was actually promised. Regardless of the fact that the consumer has not received what was wanted, that individual could not sue to stop the deception, unless she has some complaint about the product or service ***beyond*** the falsely advertised trait, or unless there happens to be a cost differential. On the facts of this case, the statute specifically proscribing false assertions of "Made in U.S.A." is rendered meaningless.

The Court of Appeal dismissed these concerns, observing that public prosecutors can pursue the wrongdoers without the same standing requirements. (Op. 13.) The public fisc is already overtaxed, but more importantly, 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." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126.) Actions by public prosecutors to challenge unfair business practices have fundamentally different characteristics than those brought by private individuals, and each serves a distinct purpose in the statutory scheme. (See *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10.) It is not within the purview of the appellate courts 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, supra*, 40 Cal.4th at p. 1037, citations omitted.)

B. Review Is Warranted to Resolve Conflicts in Court of Appeal and Federal Case Law, and to Ensure Consistency in the Application of Proposition 64's Standing Rules

Proposition 64's requirement that the plaintiff demonstrate that he has suffered "injury in fact and lost money or property as a result of" the alleged violation already has received significant attention in both the lower state courts and the federal courts. As yet, no clear consensus has been reached as to the meaning of these standing requirements, resulting in a confusing array of interpretations. This Court's input is necessary to ensure coherence and uniformity in the application of this key provision of the consumer protection laws.

For example, in *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, Division One of the Fourth Appellate District expressly declined to adopt the "benefit of the bargain" analysis that the Court of Appeal here found central to the "lost money or property" analysis. (Compare *id.*, at p. 1348, with Op. 11.) In addition, unlike the Court of Appeal in this case, *Troyk* concluded that the same allegations could satisfy both the "injury in fact" element and the "lost money or property" element. (Compare *id.*, at pp. 1347-1348 [plaintiff satisfied both prongs by alleging that he was wrongfully required to pay service charges above and beyond the properly specified premium] with Op. 9 [plaintiff cannot rely on "injury in fact" allegations to establish "lost money or property" requirement].)

Inconsistencies in the legal analysis of the standing question appear even in different decisions issued by the same court. In this case, Division Three of the Fourth Appellate District found that plaintiffs had adequately alleged "injury in fact" – interpreted according to U.S. constitutional requirements – because their purchase of the misrepresented locksets constituted an invasion of a legally protected interest. (Op. 8-9.) The court

restricted its "benefit of the bargain" analysis to its discussion of whether plaintiffs had adequately alleged "lost money or property." (Op. 9-11.)

A Division Three panel also decided *Hall, supra*, 158 Cal.App.4th at p. 847. But while that panel referenced the same article III "injury in fact" formulation used here, it interpreted that provision quite differently, namely by incorporating the "benefit of the bargain" analysis into that prong of the standing inquiry. *Hall* observed that the "injury in fact" requirement could be pled in a variety of ways, and seemed to suggest (contrary to the panel in this case) that the "injury in fact" and "lost money or property" tests could be met by the same types of allegations: A plaintiff has been "injured in fact," the *Hall* court held, if he has "(1) expended money due to the defendant's acts of unfair competition . . . (2) ***lost money or property*** . . . ***or*** (3) been denied money to which he or she has a cognizable claim." (*Hall, supra*, 158 Cal.App.4th at pp. 854-855, emphasis added.) In the end, the *Hall* court found that the plaintiff fell short of satisfying both the "injury in fact" and "lost money . . . as a result of" tests because he did not allege that he "did not want the book." (*Id.* at pp. 855, 857.)

A few months after *Hall*, Division Three decided *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583 (*Peterson*). That case involved allegations that a vendor of cell phones offered and sold insurance while unlicensed to do so. The court concluded that plaintiff had not satisfied the "injury in fact" test because he received the "benefit of his bargain" and had not alleged that he could have purchased insurance at a lower cost from someone actually licensed to sell it. (*Peterson, supra*, 164 Cal.App.4th at p. 1591.) While professing that it was not necessary to reach whether plaintiff had adequately alleged that he "lost money or property," the court nevertheless suggested he had not, for precisely the same reason that he had not pleaded "injury in fact." (*Id.* at p. 1592.)

The differing approaches employed in *Hall*, *Peterson* and this case highlight the need for guidance from this Court. Litigants within the same division of the same appellate district are left wondering what they have to plead to satisfy each of Proposition 64's standing requirements. Under *Hall*'s analysis, for example, standing in this case apparently would have been established by plaintiffs' allegations that they "did not want" foreign-made locksets.

Variations have also occurred among the few courts that have embraced the "benefit of the bargain" approach. One such case is *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 147 (*ALDF*).) In *ALDF*, the Fifth Appellate District observed that plaintiffs did not allege that the milk produced by cows treated cruelly when they were young was inferior in quality to other milk. (*Id.* at p. 145.) But unlike the Court of Appeal in this case, the *ALDF* court recognized that, had the defendants made some explicit representation regarding the origins of the milk, plaintiffs could have alleged that those representations were part of the "bargain" made, and in that manner, could have sufficiently alleged economic injury. (*Id.* at pp. 146-147.) Plaintiffs here alleged explicit misrepresentations about the origins of the locksets in question, as well as reliance on those misrepresentations in making their purchases, and thus arguably would have satisfied the *ALDF* version of the "benefit of the bargain" analysis.

Conflicts have also arisen in the federal courts, whose decisions in turn are often cited by California's intermediate appellate courts, including the panel here. For example, in *Walker v. USAA Casualty Ins. Co.* (E.D.Cal. 2007) 474 F.Supp.2d 1168 (*Walker*) – also cited by the appellate court below – the court determined that the "lost money or property" requirement must be interpreted in the same manner those terms are used in considering the proper UCL remedy. Citing *Korea Supply*, *supra*, 29 Cal.4th 1134, the district court concluded that UCL standing may be obtained only where the plaintiff's

injuries are eligible for restitution – i.e., plaintiff must have had a prior possessory or vested legal interest in the lost money or property at issue. (*Id.* at p. 1172.) In another case, the federal court concluded that the lack of such an interest did not deprive the plaintiffs of standing to seek injunctive relief, even if they could not obtain restitution. *G&C Auto Body, Inc. v. GEICO General Ins. Co.* (N.D.Cal., December 12, 2007, No. C06-04898 MJJ) 2007 U.S. Dist. Lexis 91327, at *11-*13 (*G&C*) [rejecting *Walker* because the California Supreme Court has not yet determined the meaning of "lost money or property" as used in Proposition 64 and the language of the initiative is broader than the language of the UCL's § 17203].)

Plaintiffs' allegations here likely would have passed muster under both *Walker* and *G&C*. Plainly, the law is in a state of confusion and uncertainty that only this Court can clarify.

C. The Court of Appeal's Denial of Leave to Amend Contravenes *Branick* and Other Settled Precedent Liberally Favoring Amendment

This Court had the opportunity in *Branick* to consider whether Proposition 64 altered California's longstanding liberal amendment policies. The Court made abundantly clear that the initiative "does not affect the ordinary rules governing the amendment of complaints." (*Branick, supra*, 39 Cal.4th at p. 239.) Particularly important is *Branick*'s reinforcement of the common-sense approach allowing amendment after changes have been made to the governing law, 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.)

Thus now, as before, 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 (*City of Stockton*).) "If the plaintiff has not had an opportunity to amend the complaint in response to the

demurrer, 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.*; see also *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 996.)

Inexplicably, the Court of Appeal did not even acknowledge this controlling precedent. It denied plaintiffs leave to amend for two purported reasons: (1) plaintiffs already were "on notice" of the facts they needed to plead, based on decisions in other cases, and (2) plaintiffs' proffer of new facts lacked adequate detail, and in any event, the "record" failed to support the proposed amendments. Neither of these rationales withstands scrutiny.

First, as previously noted, since Proposition 64, numerous decisions have attempted to decipher the meaning of its various terms, and the results in the lower courts have hardly been uniform. The law in this area continues to evolve as these decisions percolate up to this Court for definitive interpretation of the initiative's provisions. Thus, contrary to the Court of Appeal's conclusion, at the time of the filing of the SAC in this case (April 2008), there was no clear and consistent, let alone binding, guidance on the precise types of facts required to meet this aspect of the standing test for a false advertising claim. Indeed, the court presumably decided to publish its opinion in this case because it believed it added something to existing case law. (See Cal. Rules of Court, rule 8.1105(c).)

Second, the Court of Appeal erred in assuming that plaintiffs could not "truthfully" amend the complaint to add the necessary new facts. (Op. 15.) The court categorically stated that "the record fails to support" plaintiffs' proffer of additional facts. (Op. 14.) But only the limited record relevant to Kwikset's writ petition was before the court at the time. As the court acknowledged, there had been a trial. (Op. 14.) The true "record," therefore, was much broader, but plaintiffs were improperly denied the opportunity – in their response to Kwikset's writ petition and, again, in their petition for rehearing – to present facts from deposition and trial testimony that

demonstrated, contrary to the court's assumption, that plaintiffs in good faith could satisfy the court's interpretation of the standing requirements. (See, e.g., Real Parties' Return to Petition for Writ of Mandate 42-43; Appendix Supporting Real Parties' Petition for Rehearing 72-80, 87-90, 91-93, 124-127, 129-130; see also discussion in Real Parties' Petition for Rehearing (Pet.) 6-8.)

The Court of Appeal disallowed this proffer, holding that it was "supported by evidence not submitted to the trial court [on demurrer] and not contained in the appendix to the petition." (Order denying Rehearing Petition, dated March 18, 2009.) Of course, the panel overlooked the fact that there was no need for plaintiff to present these facts to the trial court, because they had prevailed on demurrer. The panel also disregarded that amendment may be raised at any time, including on appeal (*City of Stockton, supra*, 42 Cal.4th at p. 746), and until its decision is final, it has the power to reconsider and modify its opinion as the facts and law warrant. (See Cal. Rules of Court, rule 8.264(b)(1) and (c).)

The failure of the appellate court to allow plaintiffs' proffer of new allegations derived from prior sworn testimony in the case was particularly unfair, given that the panel cited Benson's testimony to show a purported inconsistency in the allegations regarding his standing – an assertion that, as demonstrated in plaintiffs' rehearing petition, mischaracterized the record. (Pet. 11-12.) The panel magnified this unfairness by referencing testimony (Op. 14) indicating that Benson received money from his counsel to purchase additional locksets just before the 2001 trial, to demonstrate that Kwikset's violations were ongoing. As Benson's testimony, in context, shows, these purchases have absolutely nothing to do with the pre-complaint purchases that are the subject of the standing issues here. (See 2 Exs. 305-309.) In any event, the panel's focus on Benson ignores that there are three other plaintiffs capable of maintaining this action.

For all these reasons, the panel's decision to deny plaintiffs any opportunity to amend to respond to its newly articulated pleading standards lacks even the most basic sense of "fairness" that has always informed California's longstanding amendment policy. (*City of Stockton*, *supra*, 42 Cal.4th at p. 747.) Plaintiffs should be permitted leave to amend if additional facts are required to satisfy what this Court ultimately determines to be the controlling standing requirement. Amendment will ensure that the trial court's judgment will be preserved and the voters' intent respected.

V. CONCLUSION

For the reasons given, plaintiffs respectfully ask this Court to grant review, or alternatively, to accept grant-and-hold review if the Court determines that any case now pending before it may impact the outcome here.

DATED: April 6, 2009

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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 **PETITION FOR REVIEW** is produced using 13-point Roman type, including footnotes, and contains approximately 8,360 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: April 6, 2009

PAMELA M. PARKER
Counsel for Real Parties in Interest

ATTACHMENT

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KWIKSET CORPORATION et al.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

JAMES BENSON et al.,

Real Parties in Interest.

G040675 Deputy Clerk_____

(Super. Ct. No. 00CC1275)

O P I N I O N

Original proceeding; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, David C. Velasquez, Judge. Petition granted.

Jones, Bell, Abbott, Fleming & Fitzgerald, Michael J. Abbott, Fredrick A. Rafeedie and William M. Turner for Petitioners.

No appearance for Respondent.

Soltan & Associates, Venus Soltan; Coughlin Stoia Geller Rudman & Robbins, Pamela M. Parker, Kevin K. Green; Cuneo Gilbert & LaDuca, Jonathan W. Cuneo and Michael G. Lenett for Real Parties in Interest.

* * *

This petition for a writ of mandate seeks to vacate an order of respondent superior court overruling petitioners' demurrer to the second amended complaint in the underlying action, *Benson et al. v. Kwikset Corporation et al.* (Super. Ct. Orange County, 2002, No. 00CC01275). Petitioners Kwikset Corporation and Black & Decker Corporation contend the real parties in interest failed to allege facts establishing their standing under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.; UCL; all further statutory references are to this code unless otherwise indicated) and the false advertising law (§ 17500; FAL) as required by this court's ruling in *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254. In addition, petitioners argue the complaint cannot truthfully be amended to overcome the defect.

We conclude the second amended complaint fails to adequately allege real parties suffered economic injury resulting from petitioners' use of false country of origin labels on their products. In addition, we conclude real parties have not carried their burden of showing a reasonable possibility of amending the complaint to allege the requisite economic injury. Consequently, we shall direct the trial court to vacate its ruling, enter a new order sustaining the demurrer without leave to amend, and thereafter enter a judgment dismissing the underlying action.

FACTS

1. Background

In 2000, real party James Benson filed this action "on behalf of the general public." The original complaint contained four counts, three of which asserted violations of the UCL for unlawful, unfair, and fraudulent business practices, and a fourth brought under the FAL for false advertising. The counts alleged petitioners violated several state and federal statutes, including section 17533.7 and Civil Code section 1770, subdivision (a)(4) of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.; CLRA), by marketing and selling locksets with "Made in U.S.A." or similar labels although the products contained foreign-made parts or involved foreign manufacture. The prayer sought injunctive relief and restitution for "monies wrongfully acquired and retained by [petitioners'] . . . acts of unfair competition . . . ."

Shortly after Benson filed this lawsuit, petitioners learned about an unrelated investigation by the United States Federal Trade Commission (FTC) concerning the country of origin labeling on their products. In late 2000, petitioners entered into a consent order with the FTC restricting their use of such labels. (*Benson v. Kwikset Corp., supra,* 152 Cal.App.4th at p. 1265.)

The underlying action proceeded to a court trial in December 2001. Thereafter, the court issued a statement of decision that found petitioners violated the foregoing statutes between 1996 and 2000 by placing "Made in U.S.A." or similar labels on 25 products which contained either screws or pins made in Taiwan or involved latch sub-assembly performed in Mexico. Based on its findings, the court entered a judgment enjoining petitioners "from labeling any lockset intended for sale in the State of California 'All American Made,' or 'Made in USA,' or similar unqualified language, if such lockset contains any article, unit, or part that is made, manufactured, or produced outside of the United States."

The trial court also ordered petitioners to notify its California retailers and distributors of the falsely labeled products and afford them the opportunity to return improperly labeled inventory for either a monetary refund or replacement with properly labeled items. But it denied Benson's request for restitution "to the ultimate consumers," explaining in its statement of decision that "the misrepresentations, even to those for whom the 'Made in USA' designation is an extremely important consideration, were not so deceptive or false as to warrant a return and/or refund program or other restitutionary relief to those who have been using their locksets without other complaint."

Both parties appealed from the judgment. While the appeals were pending, the electorate enacted Proposition 64. It amended the UCL and FAL to provide that, except for actions brought by the Attorney General or other public prosecutors, only a "person who has suffered injury in fact and has lost money or property as a result of . . . unfair competition" or false advertising may file suit. (§§ 17204 & 17535.) Subsequently, the Supreme Court declared the amendments apply to cases pending when Proposition 64 became effective (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232-233), but a party who had filed suit on behalf of the general public before the amendment should be given the opportunity to allege and prove facts satisfying Proposition 64's new standing requirements (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242-243).

In 2007, by a two-to-one vote, this court upheld the trial court's decision on the underlying merits. (*Benson v. Kwikset Corp., supra,* 152 Cal.App.4th at p. 1284.) But we vacated the judgment and, "[i]n accordance with *Branick*, . . . remand[ed] the case to the trial court" to allow Benson to plead and prove facts giving him standing under the revised statutes. (*Id.* at p. 1264.) If Benson "successfully allege[d] and prove[d] his right to relief under the unfair competition law and the false advertising law, as amended by Proposition 64," we directed "the court shall reenter its original judgment." (*Id.* at

p. 1284.) However, "[i]f [Benson] fail[ed] to plead or prove his right to maintain this lawsuit, the court shall enter a judgment dismissing the action." (*Ibid.*)

After the remittitur issued, Benson moved to amend the complaint to add real parties Al Snook, Christina Grecco, and Chris Wilson as named plaintiffs in an attempt to comply with this court's directions in *Benson v. Kwikset Corp., supra,* 152 Cal.App.4th 1254. The trial court granted the motion. Petitioners challenged the ruling by a writ petition to this court. The petition was summarily denied.

Petitioners then demurred to the amended complaint. The trial court overruled the demurrer. This ruling led to petitioners' second writ petition, the sole basis of which was that real parties could not satisfy the requirements to maintain a class action. This court issued an order denying it as well. A concurring opinion to the order cited this court's recent decision in *Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847 and noted it was "hard to comprehend how" real parties had sustained any injury because of petitioners' wrongful conduct.

2. The Current Petition

Both sides reacted to the comments in the concurring opinion. Petitioners filed a motion for judgment on the pleadings, but withdrew it when real parties moved to file a second amended complaint. The trial court granted the latter request.

The amended complaint alleges Benson and each of the other real parties "purchased several Kwikset locksets . . . that were represented as 'Made in U.S.A.' or [contained] similar designations." When purchasing the locksets each plaintiff "saw and read [d]efendants' misrepresentations . . . and relied on such misrepresentations in deciding to purchase . . . them. [Each plaintiff] was induced to purchase and did purchase [d]efendants' 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. In purchasing [the] locksets, [each plaintiff] was provided with products falsely advertised as 'Made in

U.S.A.,' deceiving him [or her] and causing him [or her] to buy products he [or she] did not want. Defendants' 'Made in U.S.A.' misrepresentations caused [each plaintiff] to spend and lose the money he [or she] paid for the locksets. [Each plaintiff] has suffered injury and loss of money as a result of [d]efendants' conduct . . . ."

Petitioners demurred to the second amended complaint. They argued "[a] plaintiff does not adequately plead his or her 'injury in fact' and 'loss of money' under California's [UCL] and [FAL] by simply alleging that he or she was induced by a misrepresentation to spend money to purchase a product."

The trial court overruled the demurrer. It acknowledged "the locksets have intrinsic value as locking devices and may be perfectly useful to other consumers who do not care about the place of a product's origin." But real parties' allegations "they relied upon the alleged misrepresentations on the product packaging and were induced to buy products they did not want[,] . . . suggest[ed] the products were unsatisfactory to them . . . ." Since "[t]he alleged deception" by petitioners "caused the plaintiffs 'to buy products [they] did not want,' . . . [t]he court [found the] allegations to be a sufficient statement the plaintiffs suffered injury in fact and lost money or property as a result of the alleged fraud . . . ."

DISCUSSION

1. Introduction

The right to maintain a claim is essential to the existence of a cause of action. (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 813.) Thus, the issue of a plaintiff's standing to sue may be raised at any time during the pendency of an action, including by demurrer. (*Ibid.*; *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1041.)

Writ review of an order overruling a demurrer is governed by "the ordinary standards of demurrer review . . . ." (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.) "[R]eview [of] the complaint [is] de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.]" (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1589.) We give the pleading "'a reasonable interpretation, reading it as a whole and its parts in their context'" (*Torres v. City of Yorba Linda, supra,* 13 Cal.App.4th at p. 1041), "accept as true all properly pleaded material facts, as well as facts that may be implied from the properly pleaded facts [citation], and . . . also consider matters that may be judicially noticed," but "do *not* assume the truth of contentions, deductions or conclusions of fact or law. [Citation.]" (*Peterson v. Cellco Partnership, supra,* 164 Cal.App.4th at p. 1589.)

2. Standing

As amended by Proposition 64, a private party may sue under the UCL or FAL only if the party "has suffered injury in fact and has lost money or property as a result of" another's "unfair competition" or false or misleading statements. (§§ 17204 & 17535.) Now a plaintiff pursuing a private UCL or FAL action must "make a twofold showing: he or she must demonstrate injury in fact *and* a loss of money or property caused by unfair competition [or false advertising]. [Citations.]" (*Peterson v. Cellco Partnership, supra,* 164 Cal.App.4th at p. 1590; see also *Hall v. Time, Inc., supra,* 158 Cal.App.4th at p. 852.)

When "'interpreting a voter initiative . . ., we apply the same principles that govern statutory construction. [Citation.] Thus, "we turn first to the language of the [initiative], giving the words their ordinary meaning." [Citation.] The [initiative's] language must also be construed in the context of the statute as a whole and the [initiative's] overall . . . scheme.' [Citation.] 'Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the

court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.' [Citation.] Where there is ambiguity in the language of the measure, '[b]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure.' [Citation.]" (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.)

Petitioners contend the trial court erred in overruling the demurrer to the second amended complaint, repeating their claim "[a private] plaintiff does not adequately plead his or her 'injury in fact' and 'loss of money' under [the UCL or FAL] by simply alleging that he or she was induced by a misrepresentation to buy a product that he or she would not have purchased if he or she had known of the misrepresentation." In response, real parties argue the "injury in fact" requirement is satisfied by the statutes prohibiting misleading country of origin labeling, section 17533.7 and Civil Code section 1770, subdivision (a)(4). As for the "lost money or property" requirement, real parties contend that, as "consumer purchasers . . . deceived into paying for misrepresented products," the money they expended due to petitioners' "unfair competition are amounts 'eligible for restitution.'"

Real parties have satisfactorily established they suffered an injury in fact. Courts construe the phrase "injury in fact" to mean "'[a]n actual or imminent invasion of a legally protected interest, in contrast to an invasion that is conjectural or hypothetical.' [Citation.]" (*Hall v. Time, Inc., supra,* 158 Cal.App.4th at p. 853; see also *Buckland v. Threshold Enterprises, Ltd., supra,* 155 Cal.App.4th at p. 814 [defining "[t]he requisite injury . . . as 'an invasion of a legally protected interest which is (a) concrete and particularized, [citations] and (b) "actual or imminent, not 'conjectural' or 'hypothetical'"'"].) By enacting section 17533.7, and making a violation of it subject not only to equitable relief but to civil penalties and criminal punishment (§§ 17534 & 17536), plus its enactment of Civil Code section 1770, subdivision (a)(4) as part of the CLRA, the Legislature has declared truthful country of origin product labeling is a legally

protected interest. The second amended complaint alleges each named plaintiff read and relied on petitioners' "Made in U.S.A." and similar labels when buying their products. In effect, real parties allege they are persons for whom such labels are an important factor when making purchasing decisions. In addition, real parties allege that, but for the false labeling, they would not have bought petitioners' products.

However, merely alleging the actual invasion of a legally protected interest will not suffice to support standing to maintain this action. Both the UCL and FAL require a plaintiff to also allege and prove he or she "has lost money or property as a result of" the defendant's unfair, unlawful or fraudulent conduct. (§§ 17204 & 17535.) Case law recognizes the revised standing requirements for a private UCL or FAL action "disclose[] a clear requirement that injury must be economic, at least in part, for a plaintiff to have standing . . . ." (*Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 147 ["'moral injury[]'" resulting from the defendants' alleged "violation of anticruelty laws in raising the calves" could not support UCL action because the plaintiffs did not purchase "dairy products that were . . . of inferior quality"].)

In *Hall*, this court declared: "To lose is 'to suffer deprivation of.' [Citation.] A loss is '[a]n undesirable outcome of a risk; the disappearance or diminution of value, usu. in an unexpected or relatively unpredictable way.' [Citation.]" (*Hall v. Time, Inc., supra,* 158 Cal.App.4th at p. 853.) Here, real parties allege "[d]efendants' 'Made in U.S.A.' [and similar] misrepresentations caused [them] to spend and lose the money . . . paid for the locksets." But, as petitioners note, they received locksets in return. Real parties 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 alleged the locksets purchased either were of inferior quality or failed to perform as expected.

Peterson involved an analogous situation. There a communications equipment vendor, although not licensed to do so, sold related insurance policies and

retained a portion of the premium as a fee. In affirming the dismissal of the plaintiff's UCL action, this court rejected the construction of "lost money" advanced here, which "encompasses every purchase or transaction where a person pays with money." (*Peterson v. Cellco Partnership, supra,* 164 Cal.App.4th at p. 1592.) Because the plaintiffs did not allege "they paid more for the insurance due to defendant's collecting a commission," or that "they could have bought the same insurance for a lower price either directly from the insurer or from a licensed agent," *Peterson* held the "plaintiffs ha[d] not shown they suffered actual economic injury." (*Id.* at p. 1591.) Rather they "received the benefit of their bargain, having obtained the bargained for insurance at the bargained for price. [Citation.]" (*Ibid.*)

In rejecting a broad definition of what constitutes "'lost money,'" *Peterson* cited the facts of *Hall*, where it was alleged a defendant book seller, that advertised prospective purchasers could preview a book before deciding to buy it, deceptively sent an invoice demanding payment during the free trial period. (*Peterson v. Cellco Partnership, supra,* 164 Cal.App.4th at p. 1592.) *Peterson* noted, "in *Hall*, the plaintiff 'expended money by paying [the seller] $29.51—but he received a book in exchange'; therefore he did not lose money or suffer injury in fact. [Citation.]" (*Ibid.*; see also *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105, 114 [a plaintiff purchasing insurance from unlicensed party did not "suffer[] any loss *because* of [the defendant's] unlicensed status" where he did "not allege[] that he didn't want [the] coverage in the first place, or that he was given unsatisfactory service or has had a claim denied, or that he paid more for the coverage than what it was worth because of the [defendant's] unlicensed status"].)

Thus, the UCL's and FAL's "lost money or property" requirement "limit[s] standing to individuals who suffer losses . . . that are eligible for restitution." (*Buckland v. Threshold Enterprises, Ltd., supra,* 155 Cal.App.4th at p. 817; see also *Citizens of Humanity, LLC v. Costco Wholesale Corp.* (Feb. 11, 2009, B204117) ___

Cal.App.4th ___, ___ [2009 WL 323622, at p. 14].) In this context "[t]he object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149; see also *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 696-697 [same].)

Benson originally sought restitution for the ultimate purchasers of petitioners' products. The trial court denied his request, finding that, except for the false country of origin labeling, there had been no other complaint about petitioners' products and thus there was no basis to award the ultimate purchasers restitutionary relief. It cannot be disputed that real parties intended to buy locksets. Absent a showing of some complaint about the cost, quality, or operation of the mislabeled locksets they purchased from petitioners, real parties received the benefit of their bargain and are not entitled to any restitution.

Real parties allege the false country of origin labels "caus[ed them] to buy products [they] did not want." But, in context, this allegation relates to only the injury in fact requirement. As noted, real parties clearly intended to buy locksets. The mere fact they were induced to buy petitioners' locksets because of a "Made in U.S.A." or similar label does not mean real parties "lost money or property" as a result.

Cases other than *Hall* and *Peterson* have also recognized a party does not lose money 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. In *Chavez v. Blue Sky Natural Beverage Co.* (N.D.Cal. 2007) 503 F.Supp.2d 1370, a New Mexico native sued the defendants under the UCL, FAL, and CRLA, alleging he purchased their beverages in containers with labels falsely stating the contents were packaged in Santa Fe, New Mexico. The plaintiff "assert[ed] . . . damages equal the amount paid for the . . . beverages because [he] would not have purchased the drinks had [he] known the drinks and company were no longer related to Santa Fe, New Mexico."

(*Id.* at p. 1373.) The court dismissed the action, finding the plaintiff "suffered no injury or damages as a result of [d]efendants' conduct. Plaintiff did not pay a premium for [d]efendants' beverages because the drinks purportedly originated in Santa Fe, New Mexico. Accepting the facts as stated . . . and drawing all inferences in their favor, [d]efendants' promise concerning geographic origin had no value and [p]laintiffs have suffered no damages by purchasing beverages they thought were produced in New Mexico . . . ." (*Id.* at p. 1374.)

Another relevant decision is *Animal Legal Defense Fund v. Mendes, supra,* 160 Cal.App.4th 136. It held economic injury could not be inferred from allegations the plaintiffs "bought milk they otherwise would not have bought if they had thought some of the producing herd may have been raised by respondents in cruel conditions'" because they "had the benefit of their bargain—that is, they received dairy products that were not of inferior quality." (*Id.* at pp. 146-147.)

Decisions finding a plaintiff suing under the UCL or FAL suffered economic injury also support our conclusion. In *Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, the plaintiff alleged "the use of the [truck's] fuel gauge as the instrument of measurement [wa]s neither accurate nor in accordance with California law regarding weights and measurements," and "the only way to avoid the imposition of [the defendant's refueling] charge was to overfill the fuel tank." (*Id.* at p. 803.) *Aron* held that, by alleging he purchased excess fuel before returning the leased vehicle to avoid paying a refueling fee, the plaintiff adequately "set forth a basis for a claim of actual economic injury as a result of an unfair and illegal business practice . . . ." (*Ibid.*) In *Southern Cal. Housing v. Los Feliz Towers Homeowners Assn.* (C.D.Cal. 2005) 426 F.Supp.2d 1061, the court held a housing rights organization "present[ed] evidence of actual injury based on [the] loss of financial resources" and "the diversion of staff time from other cases to investigate" the defendants' alleged acts of housing discrimination. (*Id.* at p. 1069.)

Real parties contend our construction of the UCL and FAL, as amended by Proposition 64, will "emasculate" these laws "in meritorious cases" and "relieve[]" petitioners "of all responsibility . . . for [their] violations of California's consumer protection statutes." We disagree. As noted above, there are cases where consumers have adequately alleged both injury in fact and a loss of money or property. Furthermore, even as amended, sections 17204 and 17535 allow actions by the Attorney General and other public prosecutors without the need to allege and prove the standing requirements for private plaintiffs. In fact, as noted above, shortly after Benson filed this action petitioners entered into a consent order with the FTC that limited their use of inaccurate country of origin labels. (*Benson v. Kwikset Corp., supra,* 152 Cal.App.4th at p. 1265.)

By alleging the use of false country of origin labels induced them to buy petitioners' locksets, real parties satisfied the standing requirement that they show injury in fact. It is an injury we fully comprehend and condole: their patriotic desire to buy fully American-made products was frustrated. But without an allegation of "loss of money or property," they cannot show standing under section 17204 and 17535. Therefore, the second amended complaint does not allege facts sufficient to establish real parties' standing to maintain this UCL and FAL action.

3. Right to Amend

Claiming an adverse ruling would present their "first opportunity . . . to amend the post-Proposition 64 standing allegations," real parties contend they should be afforded a chance to do so. Petitioners respond, citing this court's dispositional statement from the prior opinion remanding the case for further proceedings on the standing issue. They further contend real parties cannot carry their burden of showing a reasonable possibility of amending the second amended complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 319.)

Hall, Animal Legal Defense Fund, Chavez, Aron, and many of the other cases cited above were available to inform real parties what factual allegations were necessary to support their allegation of standing to maintain this action. Thus, real parties were on notice that merely alleging they purchased petitioners' locksets in reliance on the products' false labels would not suffice to establish standing.

Real parties make an offer of proof that they "could amend the complaint to . . . allege that there were other alternative lockset products available . . ., many of which were lower priced than . . . [petitioners'] locksets . . . or that the value of [petitioners'] locksets was less than what [they] paid . . . or the value of the locksets as represented." However, as is generally true of their return, real parties fail to provide any citation to the record or present any documentation to support the assertion there is evidence in the record supporting these proposed amendments.

In addition, as petitioners note, this case has already been through trial and the record fails to support real parties' proposed amendments. For one thing, the current complaint alleges Benson purchased petitioners' products "for himself[] and was not reimbursed." This allegation is contrary to Benson's testimony during discovery and at trial where he stated that, before filing this action, he had only purchased petitioners' products while working as a handyman and was reimbursed for each purchase. Although at trial Benson also testified he purchased petitioners' products after filing suit with funds provided to him by counsel, these transactions cannot support standing on his part either. (*Buckland v. Threshold Enterprises, Ltd., supra,* 155 Cal.App.4th at pp. 815-816 [party "'cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit,'" because "'otherwise, any litigant could create injury in fact'"].)

Real parties' restitution theory also fails because Benson unsuccessfully sought this relief in his original complaint. As mentioned above, in declining to award restitution, the trial court found consumers, including those for whom a "Made in U.S.A."

label was an important factor when making a purchase, had used petitioners' locksets "without other complaint." Thus, real parties have failed to show a reasonable possibility they could truthfully amend the complaint to allege facts establishing their standing to maintain this action.

DISPOSITION

The petition is granted. Let a writ of mandate issue ordering respondent to vacate the July 10, 2008 order overruling petitioners' demurrer and to enter a new order sustaining the demurrer without leave to amend and to thereafter enter a judgment dismissing the underlying action. Petitioners shall recover their costs.

CERTIFIED FOR PUBLICATION

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.