KAMALA D. HARRIS
DISTRICT ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO

May 8, 2009

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

RE: *Kwikset Corp. v. Superior Court (Benson)*, No. S171845
Amicus Curiae Letter In Support of Petition for Review or, Alternatively,
Request for Depublication (Cal. Rules of Court, Rules 8.500(g), 8.1125(a))

To the Chief Justice and the Associate Justices of the California Supreme Court:

San Francisco District Attorney Kamala Harris respectfully requests that this Court grant the Petition for Review in *Kwikset Corp. v. Superior Court (Benson)* or, in the alternative, order the depublication of the appellate court's opinion. Under *Kwikset*, businesses which use false advertising to sell their products in California are virtually immune from private actions brought under California's unfair competition law (UCL) and false advertising law (FAL) unless the consumer can plead and prove that the product purchased is defective, has diminished value, or is otherwise not worth the price paid. The fact that the consumer failed to receive what he wanted and expected when he parted with his money is irrelevant to the appellate court's analysis.

The *Kwikset* court failed to consider the fact that a great many consumer purchasing decisions are guided by factors that have nothing to do with price or quality of the product. The decision would, for example, preclude the filing of a private UCL or FAL action against a business that sells cookies by falsely representing that the money from the sale of each box goes to support the Girl Scouts when, in fact, the money is used to support an Al-Quaeda terrorist training camp. The decision would similarly eliminate a private UCL or FAL action in a case like *Nike, Inc. v. Kasky* (2002) 27 Cal.4th 939, where it was alleged that Nike made false statements or material omissions of fact concerning the working conditions under which its athletic shoe products are manufactured. Unless the cookies or athletic shoes were of inferior quality or too costly, *Kwikset* tells us that the consumer in each of these examples has no standing to sue.

Other examples of purchasing decisions made by consumers based on concerns outside the traditional factors of price and quality abound—including the decision to purchase free range chickens; milk from cows not fed without growth hormones; kosher foods; and "green" or environmentally friendly cleaning products. Eliminating the right

of consumers to sue for false advertising of these products based on some misguided notion that the consumer basically got what he bargained for when he received the chicken, milk, food or cleaning product does grave harm to the longstanding goals of California's unfair competition and false advertising laws.

The appellate court also ignored the fact that, for the multitude of common products sold by market competitors for which there may be little meaningful difference in quality or price, advertising becomes the key factor in winning customers. The *Kwikset* opinion would open the floodgates to false advertising for these products, causing harm to consumers who make purchasing decisions based on these misrepresentations, and to honest businesses which will lose these customers to the competitor's false advertising scheme.

Kwikset is one of a host of recent decisions where courts have shown apparent hostility towards private enforcement of the UCL and FAL by extending Proposition 64 far beyond the intent of the voters and interpreting the standing requirements in a manner that compels dismissal of even meritorious actions. The opinion sends a dangerous message to businesses that they are free to use deception to sell their products in California without fear of private action. And, if allowed to stand, the opinion may have the unintended effect of undermining the ability of public prosecutors to combat false and misleading advertising as well.

I. The Interest of the San Francisco District Attorney as Amicus Curiae

Public prosecutors, including the San Francisco District Attorney, are specifically authorized to bring actions in the name of the People of the State of California to obtain injunctive and other equitable relief, restitution, and civil penalties for violations of the UCL and FAL, and have a significant interest in ensuring that this State's consumer protection statutes are properly construed and applied. (See Bus. & Prof. Code, §§ 17203, 17204, 17206, 17535, 17536.) Public prosecutors often bring civil law enforcement actions under the UCL and FAL based on false or misleading advertising on a wide variety of products sold in California.

Although this case involves only private parties, the opinion could have substantial repercussions for law enforcement officials who invoke the UCL and FAL to challenge unlawful, deceptive, and unfair business practices. The appellate court held, in essence, that a consumer who purchases a product in reliance on a defendant's false or misleading representations is not entitled to restitution—and therefore lacks standing to sue under the UCL and FAL— unless he or she can also prove that the product purchased was defective or cost too much. If the opinion is allowed to stand, a real danger exists that courts may erroneously apply the appellate court's flawed restitution analysis in public enforcement actions, seriously undermining the effectiveness of such actions by

allowing the business to keep the profits made from sales secured through the use of the false advertising scheme.

II. The Court Of Appeal Erred In Deciding The Plaintiff Would Not Have Been Entitled to Restitution.

The *Kwikset* court committed a fundamental error in grafting additional requirements onto Business and Professions Code section 17203 ("Section 17203"), the remedies provision of the UCL, that the Legislature did not impose.[1] In construing a statute, however, the court is obligated simply "'to ascertain and declare' what is in the relevant statutes, 'not to insert what has been omitted, or to omit what has been inserted.' [The court is] not authorized to insert qualifying provisions not included, and may not rewrite the statute to conform to an assumed intention which does not appear from its language." (*Stop Youth Addiction v. Lucky Stores* (1998) 17 Cal.4th 553, 573, quoting Code Civ. Proc., § 1858.) In construing Section 17203 as providing for restitution only when the plaintiff can prove that the misrepresented product was defective or cost more than it should, the court in *Kwikset* violated this central tenet of statutory construction.

The court's limitation on restitution is particularly inappropriate given the importance of restitution in deterring unlawful conduct in both public and private UCL and FAL actions. (See *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267 ["[t]he purpose of such orders is 'to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.'. . ."].) Indeed, deterrence may be more effectively accomplished through restitution than through an injunction. (*ABC International Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1271.) Moreover, at least in the context of a public prosecutor's action, "restitution may have a collateral law enforcement effect, punishing the wrongdoer against whom restitution is sought." (*State of California v. Altus Finance Co.* (2005) 36 Cal.4th 1284, 1307.)

Given the importance of restitution in effectuating the UCL's purpose, a court has broad authority to award restitution once its equitable jurisdiction has been invoked. (See *Fletcher v. Security Pacific Nat. Bank* (1979) 23 Cal.3d 442, 452; *People v. Superior Court (Jayhill)* (1973) 9 Cal.3d 283, 287 n.1.) As this Court expressed in *Jayhill*, "a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved." (*Jayhill, supra,* 9 Cal.3d at p. 286.) By limiting the availability of restitution in a manner not contemplated by the Legislature, the *Kwikset* court would

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[1] Section 17203 empowers a court to make "such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of" unfair competition.

purport to deprive trial courts of the full range of their equitable authority to effectuate justice between the parties.

III. The Standing Requirement of Proposition 64 Does Not Alter Substantive UCL and FAL Law and Remedies.

Proposition 64 was intended to curtail abuse of the UCL and FAL by private attorneys who "file frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit." (Prop. 64, §1, subd. (b).) As indicated on the face of the initiative, the intent of the voters in enacting Proposition 64 was "to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (*Id.*, §1, subd. (e).) To address such abuses, Proposition 64 amended the UCL and FAL to provide that a private action for relief under these statutes shall be prosecuted "by any person who has suffered injury in fact and has *lost money or property as a result of such unfair competition.*" (Bus. & Prof. Code §§ 17204, 17535 [emphasis added].)

Proposition 64 did nothing to change 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." (*Californians for Disability Rights v. Mervyn's* (2006) 39 Cal.4th 223, 232 (internal citations omitted).) Nor did Proposition 64 alter the UCL and FAL remedies provisions. Both before and after Proposition 64, section 17203 expressly authorizes courts to make "such orders ... as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition ... or as may be necessary to restore to any person ... any money or property, real or personal, which may have been acquired by means of such unfair competition." (Bus. & Prof. Code § 17203.) Similarly, section 17535, both before and after Proposition 64, provides for restitution of amounts "which may have been acquired by means of any practice in this chapter [the false advertising law] to be declared to be unlawful." (Bus. & Prof. Code § 17535.)

Further, in suggesting that the *Kwikset* plaintiff would have standing to sue if he had alleged a price differential between the value of the benefit received and the price paid for the product, the appellate court improperly introduced a damages analysis into the calculation of restitution on the plaintiff's UCL and FAL claims. In *People v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 531-32, the Court affirmed that broad restitution is appropriate once a plaintiff establishes that a defendant violated the UCL of FAL. That the consumer many have gained some benefit from the product is immaterial where the defendant sold the product by means of a false representation.

The purpose of the UCL is to compel a defendant "to return money obtained through an unfair business practice to those persons in interest from whom the property

was taken," and thereby deter future violations. (*People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 134 [*quoting Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126-27].) A trial court has discretion to return "any money ... which may have been acquired" through a violation of the UCL (§§17203, 17535) without a showing of a consumer's knowledge, reliance or damage resulting from a misrepresentation; the court may exercise its discretion to purge a violator of gains ill-gotten through the violation of law. (*Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 451-52.)

Proposition 64 did not change the restitutionary regime of the UCL or FAL. The standing requirements of Business and Professions Code sections 17204 and 17535 are addressed specifically to who may prosecute an action, not to how to calculate restitution.

IV. The *Kwikset* Opinion Impermissibly Alters Substantive UCL and FAL Law and Remedies.

The *Kwikset* court essentially concluded that, because the foreign-made lockset sold by the defendant was equivalent in value to a lockset made in the United States, the plaintiff was not entitled to restitution and, therefore, did not satisfy the "lost money" element required to establish standing under the UCL and FAL. In reaching this conclusion, the appellate court used an overly narrow definition of "lost money."

Proposition 64 amended the UCL and FAL to provide standing in private actions to any "person who has suffered injury in fact and has *lost money* or property *as a result of such unfair competition*." (Bus. & Prof. Code §§ 17204, 17535 [emphasis added].) Money is "lost" if it is "parted with ... gone out of one's possession or control ... no longer possessed." (Webster's 3d New Int'l. Dict. (2002) p. 1338.]) This definition of "lost money" mirrors this Court's finding in *Korea Supply* that "ownership interest" for restitution purposes means "once in [plaintiff's] possession." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149.) The *Kwikset* court took a much more narrow view of the meaning of "lost money," apparently out of concern that the definition not be so broad as to encompass every purchase or transaction where money is exchanged. (*Kwikset v. Superior Court* (2009) 171 Cal.4th 645, 654, citing *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1592.) However, because the term "lost money" is directly modified by the phrase "as a result of such unfair competition," the appellate court's concern was unfounded.

Here, the plaintiff alleged that he lost money as a result of the defendant's false advertising by purchasing a lockset labeled "Made in USA" when in fact it was not. It is undisputed that he no longer possesses the money that the defendant induced him into paying for an unwanted foreign-made product. Whether the unwanted product the plaintiff received is equivalent in value to the advertised product does not change the analysis. Under the plain meaning and intent of Business and Professions Code sections

17204 and 17535, as amended by Proposition 64, the plaintiff's allegations clearly establish the "lost money" requirement to establish standing under the UCL and FAL.

V. Conclusion

In passing Proposition 64, California voters did not intend to bar meritorious private actions by consumers who lose money or property when they purchase products based on false advertising. Yet the *Kwikset* opinion and other recent appellate court decisions threaten to do just that. And, unless overturned or depublished, courts may erroneously apply the opinion to place limits on the availability of restitution as a remedy in false advertising cases brought by public prosecutors. Review or, alternatively, depublication of this opinion is necessary to prevent the likely confusion of courts presiding over future cases in this subject area, and the possible impact on law enforcement's ability to enforce state unfair competition and false advertising laws to protect California's consumers and the marketplace.

Thank you for considering this request.

Respectfully submitted,

KAMALA D. HARRIS
District Attorney

June D. Cravett
Assistant District Attorney

Encl.
cc: Attached service list

PROOF OF SERVICE BY MAIL

I, PEGGY McCARTHY, declare as follows:

I am a citizen of the United States and am employed in the City and County of San Francisco. I am over the age of 18 years and not a party to the within action. My business address is the San Francisco District Attorney's Office, 732 Brannan Street, Second Floor, San Francisco, CA 94103.

On May 8, 2009 I served the following document described as:

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW OR, ALTERNATIVELY, REQUEST FOR DEPUBLICATION IN *KWIKSET CORP. V. SUPERIOR COURT (BENSON)*

on the interested parties in this action by placing true copies of the attached document in addressed, sealed envelopes clearly labeled to identify the person(s) being served at the addresses set forth on the attached service list and placing said envelopes in the interoffice mail for collection and deposit in the Untied States Postal Service at the San Francisco District Attorney's Office, 732 Brannan Street, San Francisco, California, on that same date, following ordinary business practices:

**** SEE SERVICE LIST ATTACHED ****

I am familiar with the San Francisco District Attorney's Office's practice of collection and processing of correspondence for mailing with the United States Postal Service; in the ordinary course of business, correspondence placed in interoffice mail is deposited with the United States Postal Service with first class postage thereon fully prepaid on the same day it is placed for collection and mailing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 8, 2009, at San Francisco, California.

PEGGY McCARTHY

KWIKSET CORP. v. SUPERIOR COURT (BENSON)
Case Number S171845

SERVICE LIST

Party	Attorney
Kwikset Corporation : Petitioner	Fred A. Rafeedie Jones Bell Abbott et al LLP 601 S Figueroa St 27FL Los Angeles, CA Michael J. Abbott Jones Bell Abbott et al LLP 601 S Figueroa St 27FL Los Angeles, CA
The Black & Decker Corporation : Petitioner	Fred A. Rafeedie Jones Bell Abbott et al LLP 601 S Figueroa St 27FL Los Angeles, CA Michael J. Abbott Jones Bell Abbott et al LLP 601 S Figueroa St 27FL Los Angeles, CA
The Superior Court of California, County of Orange : Respondent Attn: Hon. David Velasquez Dept. # CX-101 700 Civic Center Dr. West Santa Ana, CA 92701	
Benson, James : Real Party in Interest	Venus Soltan Soltan and Associates 450 Newport Center Drive Suite 350 Newport Beach, CA Pamela M. Parker Coughlin, Stoia, Geller, Rudman & Robbins, LLP 655 W. Broadway, Suite 1900 San Diego, CA
Snook, Al : Real Party in Interest	Venus Soltan Soltan and Associates 450 Newport Center drive Suite 350 Newport Beach, CA Pamela M. Parker Coughlin, Stoia, Geller, Rudman & Robbins, LLP 655 W. Broadway, Suite 1900 San Diego, CA

Grecco, Christina : Real Party in Interest

Venus Soltan
Soltan and Associates
450 Newport Center drive
Suite 350
Newport Beach, CA

Pamela M. Parker
Coughlin, Stoia, Geller, Rudman & Robbins, LLP
655 W. Broadway, Suite 1900
San Diego, CA

Wilson, Chris : Real Party in Interest

Venus Soltan
Soltan and Associates
450 Newport Center drive
Suite 350
Newport Beach, CA

Pamela M. Parker
Coughlin, Stoia, Geller, Rudman & Robbins, LLP
655 W. Broadway, Suite 1900
San Diego, CA