# Consumer Action

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May 6, 2009

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

Re: *Kwikset Corp. v. S.C. (Benson)*, No. S171845
Amicus Curiae Letter Supporting Petition for Review

Honorable Justices of the California Supreme Court:

Pursuant to the California Rules of Court, rule 8.500(g), non-profit organizations California Public Interest Research Group, Consumer Action, Consumer Federation of California, Consumers for Auto Reliability and Safety, Consumer Watchdog and United Policyholders respectfully submit this joint letter in support of the petition for review. In the traditional role of amici curiae, these public interest groups seek to "'assist the court by broadening its perspective on the issues raised by the parties.'" (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177.)

## *I. Given Their Common Mission of Consumer Protection, the Amici Curiae Have an Interest in Whether this Court Grants Review Here*

California Public Interest Research Group ("CALPIRG") (www.calpirg.org) is a non-profit, non-partisan consumer group uniting researchers, advocates, organizers, and students. Founded in 1973, CALPIRG stands up to powerful interests and advocates for Californians, working to win concrete results for our health and well-being. Over decades of advocacy, CALPIRG has advanced consumer protections by working on product safety, health care and health insurance, consumer privacy, and public health protections. In the media, in the statehouse, and in the courts, CALPIRG works to promote California consumers' interests and protect them from corporate wrongdoing.

Consumer Action (www.consumer-action.org) is a non-profit, membership-based organization that was founded in San Francisco in 1971. During its more than three decades, Consumer Action has continued to serve consumers nationwide by advancing consumer rights, referring consumers to complaint-handling agencies through a free hotline, publishing educational materials in Chinese, English, Korean, Spanish, Vietnamese and other languages, advocating for consumers in the media and before lawmakers, and comparing prices on credit cards, bank accounts and long distance services. Consumer Action was a plaintiff in the widely-cited precedent of *Badie v. Bank of America* (1998) 67 Cal.App.4th 779.

The Consumer Federation of California ("CFC") (www.consumercal.org) is a non-profit advocacy organization. Since 1960, CFC has been a powerful voice for consumer rights. CFC campaigns for state and federal laws that place consumer protection ahead of corporate profit. Each year, CFC testifies before the California legislature on dozens of bills that affect millions of our state's consumers. CFC also appears before state agencies in support of consumer regulations and participates in court actions, as here, involving consumer law. Recent areas of activity for CFC include protecting consumer financial privacy, reforming accounting industry practices, enabling patients to sue HMOs for denial of care, holding homebuilders accountable for construction defects, prohibiting manufacturers from keeping secret vital safety information about defective products, enacting cell phone users rights and strengthening food safety laws.

Consumers for Auto Reliability and Safety ("CARS") (www.carconsumers.com) is a national, award-winning non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS has spearheaded enactment of many landmark laws to protect the public and successfully petitioned the National Highway Traffic Safety Administration and various state agencies for promulgation of consumer protection regulations. The United States Congress has repeatedly invited the President of CARS to testify on behalf of American consumers regarding auto safety practices and policies, including air bags and other automatic restraint systems, the safety hazards posed by salvage and flood vehicles,

mandatory binding arbitration in auto sales contracts, and various fraudulent and predatory auto sales practices, which affect the ability of car buyers to afford advanced safety systems.

Established in 1985, Consumer Watchdog (www.consumerwatchdog.org), formerly The Foundation for Taxpayer and Consumer Rights, is a California-based, non-profit public benefit corporation. A core mission of Consumer Watchdog is to defend, enforce, and monitor the implementation of Proposition 103, the insurance reform measure approved by the voters in 1988, and other Insurance Code provisions. Consumer protection statutes such as Proposition 103 are enforced through the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.), whose standing requirements are at issue here. Consumer Watchdog and its attorneys have participated in virtually every major legal action, including many under the UCL, concerning the proper interpretation and application of Proposition 103.[1]

United Policyholders ("UP") is a non-profit consumer organization founded in 1991 that helps solve insurance problems and advocates for integrity in the insurance system. Donations, grants and volunteer labor support the organization's work. UP's work is divided into three subject areas: The UP Roadmap to Recovery program offers help navigating and settling catastrophic loss claims; the UP Roadmap to Preparedness program promotes disaster and financial preparedness and insurance literacy; and the UP Amicus Project/Advocacy program advances the interests of insurance consumers in courts of law, legislative/ public policy forums, and in the media. UP monitors the national insurance marketplace with a particular focus on California and areas impacted by natural disasters. UP offers a library of free tips, articles, sample forms and links relating to all aspects of insurance coverage and claims at www.uphelp.org.

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[1] See, e.g., *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403; *Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968; *Spanish Speaking Citizens' Foundation v. Low* (2000) 85 Cal.App.4th 1179; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805.

The petition for review in *Kwikset* has not just statewide but national implications that greatly concern these amici. On legal questions, as on so many things, California is a pacesetter. (See Jake Dear & Edward W. Jessen, *The California Supreme Court, 1940-2005: A Preliminary Measure of Influence*, California Supreme Court Historical Society Newsletter, Autumn/Winter 2006, pp. 2-8.) This state long ago ensconced itself at the forefront of consumer protection. (See, e.g., *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807-808.) At least until recently, it was widely understood that "California's consumer protection laws are among the strongest in the country." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 242.) If the UCL has become as toothless as the *Kwikset* appellate panel sought to declare, this dubious outlook is bound to spread outside the state's borders – to the detriment of the citizenry these laws are meant to protect.

## II. The Standing Required to Challenge Acts of Unfair Competition and False Advertising is a Hot Issue Demanding this Court's Attention

Amici are aware that a truly review-worthy petition must present more than just an important issue or a split in authority. (Cal. Rules of Court, rule 8.500(b)(1).) In light of the sheer volume of petitions this Court receives, the issue must also possess an element of ripeness and urgency. The issue must cry out for the Court's attention without further delay.

These prudential considerations are satisfied here, for the time to address the standing requirements ushered in by Proposition 64 is now. The subject has been percolating for nearly five years. As the petition for review explains, the current case law is a disjointed jumble from not only California's intermediate courts, but also the federal bench routinely hearing UCL claims today. A reader of the case law discerns no clear and consistent guidelines on when UCL standing exists and when it does not. Only this Court can arrest the slide into further confusion and guesswork on what allegations are required to bring a private action enforcing the UCL and its sister statute, the False Advertising Law (FAL) (Bus. & Prof. Code, § 17500 et seq.).

Indeed, granting review here to elaborate the content of the standing requirements is the next step in developing this Court's post-Proposition 64 jurisprudence. Delving into the subject logically builds on opinions addressing: (1) whether the initiative applies to pending cases (it does, see *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223 (*Mervyn's*); (2) whether leave to substitute new plaintiffs with standing is within the trial court's discretion (it is, see *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235 (*Branick*); (3) whether all private UCL claims must now satisfy class action procedural rules (to be decided in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, No. S151615, and *Arias v. Superior Court*, No. S155965, both argued April 8, 2009); and (4) whether in a UCL suit brought as a class action, every class member must comply with the standing requirements and have actually relied on the defendant's representations (to be decided in *Tobacco II Cases*, No. S147345, argued March 3, 2009).

The need for Supreme Court guidance is underscored by the harsh tenor of the decisions to date. Encouraged by the defense bar and business interest groups to enter dismissals, many judges have erroneously assumed that the unstated goal of Proposition 64 was to end virtually all private UCL litigation. Should this view continue to prevail, the UCL will have little meaning. To take one example, if the *Kwikset* panel's grudging view of private consumer standing is correct, California law no longer prohibits a misleading advertisement that "targets a particular disadvantaged or vulnerable group," like children or retirees. (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 506.) Under *Kwikset*, unless those plaintiffs can establish a product defect or a price differential, it does not matter that the advertisement duped them and enabled the seller to wrongfully take their money. They will have no standing to be in court. The void this creates will provide a haven for "innumerable new schemes which the fertility of man's invention would contrive." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181, internal quotation marks omitted.) Meritorious UCL actions will be routinely dismissed and acts of unfair competition will go unremedied.

Six years ago, this Court observed that "'[t]o open the newspaper today is to receive a daily dose of scandal . . . .'" (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 181.) Since then little has changed. If anything, the revelations in the business press today are even more shocking. A license to lie and defraud would be most ironic after a decade in which the American economy has been plagued, and consumers victimized, by corrupt business conduct. Now is not the time for the judicial branch to turn a blind eye.

### III. Proposition 64's Sparse Language Demands, as In the Past, an Active Role for this Court in Shaping UCL Jurisprudence

In contrast to the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.), which proscribes specific practices, the text of the UCL is framed in generalities. Because so much is entrusted to judicial construction, cogency and uniformity in the case law are crucial.

Reflecting the prominent role for the bench in developing UCL doctrine, this Court has consistently acted to ensure a cohesive jurisprudence. A wealth of Supreme Court precedent, stretching back decades, addresses a host of issues under the UCL, related to both liability and remedies. The leading decisions consistently emphasize the UCL's broad reach and protective force. (See, e.g., *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1266; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1151; *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126 (*Kraus*); *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266-1267; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 209-214; *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 449-454; *Barquis v. Merchants Collection Ass'n* (1972) 7 Cal.3d 94, 109-113.) Under a settled rule of statutory interpretation, this common law architecture is presumed to survive passage of initiatives such as Proposition 64. (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.) But, Courts of Appeal and federal judges applying the standing requirements (most often to dismiss) have ignored the seminal UCL precedents, much as the *Kwikset* panel did here.

This approach, of course, flouts this Court's admonition that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted." (*Mervyn's, supra,* 39 Cal.4th at p. 232.) Proposition 64 left Business and Professions Code section 17200, containing the familiar liability prongs, undisturbed. It also did not tamper with the remedial scheme emanating from section 17203. (*Ibid.*) On what it did amend, the measure continued the pattern of using limited statutory language. As this Court observed: "Proposition 64 accomplishes its goals in relatively few words." (*Id.* at p. 228.)

The UCL and the FAL now require a private litigant, to have standing, to demonstrate "injury in fact" and that he or she "lost money or property as a result of" the unfair competition or false advertising. (Bus. & Prof. Code, §§ 17204, 17535.) Unquestionably, this narrowed private consumer standing. Before Proposition 64, "any person acting for the general public" could bring a UCL case. (*Mervyn's, supra,* 39 Cal.4th at p. 227.) As *Kwikset* exemplifies, however, courts are applying the new requirements with a vengeance in ways the voters were not told would occur.

## IV. The Findings and Ballot Materials Confirm that Proposition 64 Was Not Meant to Halt Legitimate UCL Actions in Their Tracks

In its initial decisions addressing Proposition 64, this Court took heed of not just the minimal statutory language the voters approved, but also the supporting findings and ballot materials. (See *Mervyn's, supra,* 39 Cal.4th at p. 228; *Branick, supra,* 39 Cal.4th at pp. 241-242.) This presents no problem of a secondary source overriding or displacing statutory text. Because a measure passed by the voters is involved, the statutory language is read "in light of the initiative as a whole." (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1039; see also *id.* at pp. 1052-1068 [setting forth initiative and ballot materials in that case].)

Here, the full package told the electorate precisely what rights were being rescinded and, just as importantly, what rights would be preserved if Proposition 64 became law. Although many courts have ignored the point, the voters expressly

reaffirmed the need for a vibrant UCL to protect them in the marketplace. The findings actually begin as follows: "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." (Prop. 64, § 1, subd. (a).) By enacting Proposition 64, the voters sought to increase the UCL's legitimacy by clamping down on "frivolous" UCL actions. "It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to [section 17200]." (*Id.*, subd. (d).)

The word "frivolous" is a term of art with an established meaning. Because our society values access to the civil justice system, a lawsuit is not lightly found to meet this standard. "'Frivolous' means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party." (Code Civ. Proc., § 128.5, subd. (b)(2); see also *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Proposition 64 was designed to do away with such suits, typically brought by an "unaffected" plaintiff just lending his or her name to the complaint. Such persons had no basis for claiming legal injury because they had not "used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant." (Prop. 64, § 1, subd. (b)(3).)

The ballot arguments for and against Proposition 64 necessarily informed the voters' understanding and, too, shed light. The proponents assured the electorate that the initiative "*[p]rotects your right to file a lawsuit if you've been damaged.*" (Ex. 1, copy attached.) Opponents expressed concern that Proposition 64 was being pushed by powerful interests – including chemical companies, tobacco companies, banks and insurers – who sought to give themselves immunity from this state's consumer protection laws. Opponents contended, for instance, that HMOs "don't want to be held accountable for fraudulent marketing" and "misrepresenting their services to patients." (*Ibid.*) Opponents warned that Proposition 64 could "limit your right to enforce the laws that protect us all." (*Ibid.*) In response, proponents reassured the voters that the measure would not have these adverse consequences. Among other things, proponents

represented: "*Proposition 64 would permit ALL the suits cited by its opponents.*" (*Ibid.*) They reiterated that the initiative "*[p]rotects your right to file suit if you've been harmed.*" (*Ibid.*)

**V. As this Case Illustrates, Courts Are Erroneously Dismissing UCL Suits**

Some of the decisions have wandered far from Proposition 64's central objective of ensuring that private UCL actions are brought by consumers with a nexus to the defendant, not by figurehead plaintiffs. In particular, litigants who compellingly demonstrated violation of a predicate law – thus establishing an "unlawful" business practice (Bus. & Prof. Code, § 17200) – are seeing courts hold there is no standing. The *Kwikset* case is illustrative and extremely troubling. Liability has already been proved and relief should follow, if only the *Kwikset* plaintiffs could pry open the courthouse doors.

The Legislature has enacted the following statute at issue in *Kwikset*:

> It is unlawful for any person, firm, corporation or association to sell or offer for sale in this State any merchandise on which merchandise or on its container there appears the words "Made in U.S.A.," "Made in America," "U.S.A.," or similar words when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.

(Bus. & Prof. Code, § 17533.7.) This provision, adopted in 1961, has never been amended. It accordingly reflects established public policy proscribing a form of false advertising the Legislature deemed especially odious. The Legislature determined that sellers should not be allowed to boast that a product was made in America, and thereby lure purchasers to buy it, if this is not true.

As discussed in the petition for review, the original plaintiff, James Benson, proved in a bench trial well before Proposition 64 that Kwikset Corporation violated the "Made in the U.S.A." statute and other laws. In an opinion rendered in 2004 before the initiative, the Court of Appeal affirmed the finding of liability, made by a respected trial judge who now sits on the same appellate bench. After this Court held Proposition 64 applicable to pending cases in *Mervyn's*, the complaint was amended to add three new

consumer plaintiffs. None were strangers to Kwikset who had no connection to the product or the wrongdoing alleged – the scenario the voters sought to end with Proposition 64. To the contrary, the plaintiffs alleged that they (1) each saw the "Made in the U.S.A." misrepresentation by Kwikset on the lockset packaging, (2) they relied on the misrepresentation and it was integral to their decision to purchase a Kwikset lockset, and (3) had they known the truth, they would not have bought the product.

The operative pleading therefore alleges a pristine false advertising case. The Court of Appeal's response? The plaintiffs did not actually lose money due to the illegal business conduct because "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." (*Kwikset v. Superior Court* (2009) 171 Cal.App.4th 645, 653-654.) The opinion continues: "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." (*Id.* at p. 655.) Seeking to justify the draconian disposition, the opinion simply proclaimed that locksets made in America, and ones that are not, are necessarily of "equivalent value." (*Ibid.*)

With all respect, this result-driven rationale is absurd. It vitiates the "Made in the U.S.A." statute, a law of general application that was supposed to be alive and well notwithstanding Proposition 64. (See Ex. 1 [ballot arguments].) The panel's newly-announced standing requirement has no foundation in Proposition 64's text or ballot materials and, beyond this, it makes no sense.

The "bargain" the *Kwikset* plaintiffs struck was to buy a lockset made in this country. They carried out their end of the bargain by paying for this product, but they did not get a lockset made in the United States. Failing to keep its end of the bargain, Kwikset took their money and took advantage of their patriotism, and deliberately sold them something else. As discussed in the petition for review, Kwikset made a bundle off

this scheme because foreign-made locksets, like most products made outside America, cost considerably less to manufacture. Kwikset pulled this off by relocating a plant from Orange County to Mexico, with the concomitant loss of American jobs in the process. Yet, unless this Court grants review, Proposition 64 will be Kwikset's escape hatch from a meritorious UCL action in which its liability, again, has already been proved.

Amici are aware of at least one superior court action in which the passages quoted above were wielded to obtain a dismissal, in a false advertising suit against the Applebee's restaurant chain. (See Ex. 2 [memorandum seeking dismissal based on lack of standing]; Ex. 3 [order granting motion].) As this recent case demonstrates, under *Kwikset* the courts will not be open to challenge a falsely advertised product unless the plaintiff also alleges and proves a defect in the product, or that cheaper alternatives were available, or that the product was not "worth" what the consumer paid. This has nothing to do with standing as that concept is usually understood (meaning a sufficiently concrete and direct interest). Moreover, the *Kwikset* court's stringent requirements are difficult enough to prove with evidence, much less to allege at the pleading stage, before discovery, when standing is often determined. If *Kwikset* is the law, the negative impact on California's false advertising prohibitions will be substantial.

Similar injustices have unfolded recently in other UCL cases. Another striking example is *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, petn. for review pending, petn. filed April 20, 2009 (No. S172288). The opinion held, in no uncertain terms, that an insurance company ran afoul of a key Insurance Code provision governing auto insurance contracts, violation of which was a misdemeanor. Despite a finding of ***criminal*** liability, the panel there reversed a class action judgment of $115 million, plus prejudgment interest of more than $20 million, that had been awarded to a class of nearly one million policyholders. The reason for reversal? The appellate court remanded for further proceedings to address whether the class representative, a policyholder of the insurer, somehow lacked Proposition 64 standing. Similar to *Kwikset*, there was no dispute the class representative was out money due to the practice he challenged. And, similar to *Kwikset*, the *Troyk* court strained for a rationale that would call standing into doubt when, under a straightforward approach, the question should not have been close.

Finally, both *Kwikset* and *Troyk* sought to reassure the public it need not worry because the Attorney General and district attorneys can always pursue unfair business competition. (*Troyk, supra,* 171 Cal.App.4th at p. 1351, fn. 35; *Kwikset, supra,* 171 Cal.App.4th at p. 656.) But, those officials are simply outgunned due to severe constraints on the public treasury. The voters, moreover, did not endorse the myopic approach suggested in *Kwikset* and *Troyk*. Neither has this Court, which has consistently recognized the value of, and practical need for, private enforcement. (See *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 156; *Kraus, supra,* 23 Cal.4th at p. 126.) Fundamentally, a public enforcement action is not interchangeable with a private one. They have different attributes and distinct roles to play in the enforcement framework. (See *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10.)

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For all the reasons stated, amici believe this Court should grant review to provide badly needed clarification and guidance on the UCL and FAL standing requirements.

Respectfully submitted,

Ken McEldowney, Executive Director