NO. S171845

IN THE
SUPREME COURT OF CALIFORNIA

Kwikset Corporation, *et al.*,
***Petitioners*,**
vs.
The Superior Court Of Orange County,
***Respondent*,**

James Benson, *et al.*,
Real Parties in Interest

After a Decision by the California Court of Appeal,
Fourth Appellate District, Division Three
Case No. G040675

Honorable David C. Velasquez
Judge of the Superior Court for the County of Orange
O.C.S.C. Case No. 00CC01275

Unfair Competition case. Service on the Attorney General
For the State of California and the District Attorney
For the County of Orange required by California Business
And Professions Code section 17209.

ANSWER TO PETITION FOR REVIEW

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Kwikset Corporation and The Black & Decker Corporation (collectively "Kwikset") submit this answer to the Petition For Review filed by real parties in interest James Benson, Al Snook, Christina Grecco, and Chris Wilson (hereinafter "Plaintiffs").

I. INTRODUCTION

The Court of Appeal issued a writ of mandate "ordering respondent [Superior Court] to vacate the July 10, 2008 order overruling [Kwikset's] demurrer and to enter a new order sustaining the demurrer without leave to amend and to thereafter enter a judgment dismissing the underlying action." (Op. at 15). The Court of Appeal issued the writ of mandate because Plaintiffs were not able to plead facts establishing that they had "lost money" as a result of the misleading "Made in USA" advertising on Kwikset's locksets. The Court of Appeal concluded that Plaintiffs had failed "to adequately allege [that they] suffered economic injury resulting from petitioners' use of false country of origin labels on their products," and that Plaintiffs had "not carried their burden of showing a reasonable possibility of amending the complaint to allege the requisite economic injury." (Op. at 2).

This straightforward case presents neither an unsettled question of law nor a necessity to secure uniformity of decision. *See* Cal. R. Ct. 8.500(b)(1). This Court should deny review.

II. BACKGROUND

On January 21, 2000, Plaintiff Benson filed this action on behalf of the general public alleging that Kwikset had violated sections 17200 and 17500 of the Business and Professions Code by representing its locksets as "Made in USA" and/or "All American Made." (Op. at 3; Pet.

Ex. 2 at 91–103).

A court trial took place in December of 2001, and resulted in a judgment in favor of plaintiff Benson. (Op. at 3; Pet. Ex. 10 at 277–78 ["Original Judgment"]). In the Original Judgment, the Superior Court ordered injunctive relief prohibiting Kwikset from mislabeling its locksets as "Made in USA" in the future and directing Kwikset to notify commercial sellers of its locksets that they could exchange mislabeled locksets remaining in their inventories. (Op. at 3-4; Pet. Ex. 10 at 278). The Superior Court, however, denied on the merits plaintiff Benson's request for restitution to past purchasers of Kwikset's locksets. (Op. at 4; Pet. Ex. 10 at 275). The Superior Court concluded that '[a]lthough the court has found a violation of law, 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 lockets without other complaint." (*Id.*).

The parties appealed, and on June 29, 2007 the Court of Appeal vacated the Original Judgment on the ground that the plaintiff had not established his standing under Proposition 64. However, in accordance with this Court's decision in *Branick v. Downey Savings & Loan Assn.*, 39 Cal. 4th 235 (2006), the Court of Appeal remanded the case to the Superior Court "with directions to afford plaintiff an opportunity to move for leave to file an amended complaint that alleges facts establishing the standing and representative action requirements for unfair competition law and false advertising law claims as implemented by Proposition 64." *Benson v. Kwikset Corporation*, 158 Cal. App. 4th 1254, 1284 (2007). The Court of Appeal also directed the Superior Court to either (1) reimpose the original judgment if plaintiff pled and proved his standing under Proposition 64, or (2) dismiss this action "[i]f plaintiff fails to plead or prove his right to

maintain this lawsuit" under Proposition 64. *Id.*

On November 29, 2007, the Superior Court granted Plaintiffs leave to amend, and ordered Plaintiffs' First Amended Complaint ("FAC") deemed filed on that date. (Pet. Ex. 9 at 232–34). On December 28, 2007, Kwikset filed a demurrer to Plaintiffs' FAC arguing that Plaintiffs could not satisfy the class action requirements imposed by section 382 of the Code of Civil Procedure and that Plaintiffs had not alleged facts establishing that they had suffered a loss of money as a result of the "Made in USA" advertising. (Pet. Exs. 10, 11, 12). On January 31, 2008, the Superior Court overruled Kwikset's demurrer. (Pet. Ex. 16 at 382–85).

In response to that ruling, Kwikset filed a petition for writ of mandate requesting that the Court of Appeal order the Superior Court to vacate its ruling on Kwikset's demurrer, and instead sustain the demurrer without leave to amend. On March 10, 2008, the Court of Appeal summarily denied the petition. (Op. at 5). Presiding Justice Sills concurred in that denial but wrote separately as follows:

> I write separately to underscore that I vote to deny this petition only because it is not based on the issue of whether plaintiff suffered "injury in fact." Indeed, I find it hard to comprehend how this plaintiff sustained any "injury in fact," as this court has recently had occasion to construe the term. *See Hall v. Time Inc.* (2008) 158 Cal. App. 4th 847 [consideration paid for book because of misleading and deceitful tactics to fool customers into thinking that they were under obligation to pay for book held not to be injury in fact].) However, the injury in fact issue was not raised in the petition and remains open for adjudication.

(Pet. Ex. 26 at 533 – 34; *see* also Op. at 5).

On March 18, 2008, Kwikset filed a motion for judgment on the pleadings arguing that Plaintiffs' FAC failed to allege facts establishing

they had suffered an injury in fact and a loss of money as a result of the "Made in USA" advertising. (Pet. Ex. 18). Plaintiffs filed an opposition and supplemental opposition to that motion. (Pet. Exs. 19, 22).

On April 11, 2008, before Kwikset's motion for judgment on the pleadings could be heard by the Superior Court, Plaintiffs filed a motion for leave to file a second amended complaint.[1] (Pet. Ex. 21). In their motion for leave, Plaintiffs stated that "several cases have been decided by the Courts of Appeal further elucidating the Proposition 64 requirements," and that they were seeking leave to amend in order to "more fully set forth their allegations that they suffered 'injury in fact' and 'lost money or property as a result of the unfair competition' . . . ." (Pet. Ex. 21 at 429 ll. 3-4, 12-14).

On May 15, 2008, the Superior Court granted Plaintiffs' motion for leave to amend and deemed Plaintiffs' Second Amended Complaint ("SAC") filed on that date. (Pet. Ex. 25). In their SAC, Plaintiffs alleged they were "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," and that they lost "the money [they] paid for the locksets." (Pet. Ex. 21 at 447 – 49).

On June 13, 2008, Kwikset filed a demurrer to Plaintiffs' SAC arguing that Plaintiffs had failed to allege facts establishing that they suffered injury in fact and a loss of money as a result of the "Made in USA" representations on the locksets they had purchased. (Pet. Ex. 26 at 506 – 10). The demurrer was opposed by Plaintiffs. (Pet. Exs. 27, 29). On July 10, 2008, the Superior Court overruled Kwikset's demurrer to

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[1] As a result of the filing of Plaintiffs' motion for leave to file a second amended complaint, Kwikset withdrew its motion for judgment on the pleadings. (Pet. Ex. 23 at 487 – 88).

Plaintiffs' SAC. (Pet. Ex. 31).

On July 17, 2008, Kwikset once again filed a petition for writ of mandate requesting that the Court of Appeal order the Superior Court to vacate its ruling on Kwikset's demurrer, and instead sustain the demurrer without leave to amend. On August 29, 2008, the Court of Appeal issued an order to show cause "why a petition for writ of mandate should not issue commanding the superior court to . . . enter a new and different order sustaining the demurrer without leave to amend." On September 29, 2008, Plaintiffs filed their Return to Kwikset's petition. On November 20, 2008, the Court of Appeal heard oral argument, and the matter was submitted on that date.

On February 25, 2009, the Court of Appeal issued a writ of mandate "ordering respondent [Superior Court] 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." (Op. at 15). The Court of Appeal held that Plaintiffs had failed "to adequately allege [that they] suffered economic injury resulting from petitioners' use of false country of origin labels on their products" and that Plaintiffs had "not carried their burden of showing a reasonable possibility of amending the complaint to allege the requisite economic injury." (Op. at 2).

On March 13, 2009, Plaintiffs filed a petition for rehearing seeking to convince the Court of Appeal to give them leave to amend their complaint yet again. Filed concurrently with the petition for rehearing was a motion for judicial notice wherein Plaintiffs requested the Court of Appeal to take judicial notice of purported evidence and documents that Plaintiffs claimed supported their proposed amendments to the complaint. On March 18, 2009, the Court of Appeal denied Plaintiffs' petition for rehearing stating that the petition "is supported by evidence not submitted

to the trial court and not contained in the appendix to the petition," and that the "court cannot consider evidence called to its attention for the first time after determination of the appeal."

On April 6, 2009, Plaintiffs filed their Petition For Review with this Court.

III. THIS COURT SHOULD DENY REVIEW

A. Review Is Not Necessary To Secure Uniformity Of Decision Or To Settle An Important Question Of Law Regarding Proposition 64's "Lost Money" Requirement

Although Plaintiffs contend that review is necessary to "secure uniformity of decision" and "to settle an important question of law," (Pet. at 2), Plaintiffs fail to provide any support for that contention.

First, Plaintiffs assert that "the lower courts are erroneously interpreting the standing requirements in a manner that compels dismissal of even meritorious UCL and FAL lawsuits . . . ." (Pet. at 14). Plaintiffs, however, fail to cite even a single lower court decision to support their assertion.

Second, Plaintiffs assert that the Court of Appeal's decision is inconsistent with this Court's precedent and the basic rules of statutory construction. (Pet. at 16). Again, Plaintiffs fail to explain or support this assertion. (*See* Pet. 16-20). The Court of Appeal in this case held that the "lost money" requirement of Proposition 64 required Plaintiffs to allege facts reflecting that they "suffered economic injury resulting from [Kwikset's] use of false country of origin labels on [its] products." (Op. at 2, 9-13). The Court of Appeal concluded that Plaintiffs had failed to allege such facts. (*Id.*). The Court of Appeal pointed out that Plaintiffs received

locksets in exchange for the money they paid, and that Plaintiffs had no other complaint about the locksets such as they were defective, or that they were not worth what Plaintiffs paid for them, or that they cost more than similar products without a false country of origin label, or that they were of inferior quality, or that they failed to perform as expected. (Op. at 9). The Court of Appeal held that in the absence of an allegation of that sort, Plaintiffs had not alleged facts reflecting that they suffered a loss of money as a result of the "Made in USA" representations on the locksets. (Op. at 9, 11). That holding is not inconsistent with any of this Court's precedent or the rules of statutory interpretation.

Third, Plaintiffs argue that the Court of Appeal's decision will "eviscerate" California's consumer protection laws. (Pet. at 20). Once again, however, Plaintiffs have failed to provide any support for their argument. In any event, Plaintiffs' argument is untenable. The Court of Appeal simply concluded that Plaintiffs had failed to allege facts establishing that they had "lost money" as a result of Kwikset's "Made in USA" representations. Such a holding will have no impact on California's consumer protection laws. As the Court of Appeal noted in rejecting Plaintiffs' argument, there are no shortage of "cases where consumers have adequately alleged both injury in fact and a loss of money or property." (Op. at 13). Moreover, the Court of Appeal recognized that the Attorney General and other public prosecutors may prosecute UCL and FAL actions "without the need to allege and prove the standing requirements for private plaintiffs." (Op. at 13).

Fourth, Plaintiffs assert that 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." (Pet. at 22 [*see* section heading]). However, the cases to which Plaintiffs cite, *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305 (2009), *Hall v. Time, Inc.*,

158 Cal. App. 4th 847(2008), *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583 (2008), *Animal Legal Defense Fund v. Mendes*, 160 Cal. App. 4th 136 (2008), *Walker v. USAA Casualty Insurance Co.*, 474 F. Supp. 2d 1168 (E.D. Cal. 2007), and *G & C Auto Body, Inc. v. GEICO General Ins. Co.*, 2007 U.S. Dist. Lexis 91327 (N.D. Cal. 2007), do not reflect any such conflicts or inconsistency. In fact, these cases are remarkably consistent with each other, and with the Court of Appeal's decision in this case.

In *Troyk*, the court held that the plaintiff satisfied the "lost money" requirement of Proposition 64 because he alleged that he was required to pay more than the stated premium for the insurance policy he purchased. 171 Cal. App. 4th at 1348. Contrary to Plaintiffs' assertion, this holding does not conflict with the Court of Appeal's decision in this case. In fact, the Court of Appeal here suggested that Plaintiffs could have satisfied the "lost money" requirement if they had alleged that they paid more than actual value for the locksets they purchased. (Op. at 9).

In *Hall*, the plaintiff's UCL action was based on the allegation that he was induced by misrepresentations concerning a "free preview" period to buy a book from the defendants for $29.95. In affirming the trial court's dismissal of the action at the pleading stage, the court of appeal held that the plaintiff's payment of the purchase price did not satisfy the standing requirements of Proposition 64:

> In this case, [plaintiff] did not allege he suffered an injury in fact . . . . He expended money by paying Time $29.95 – but he received a book in exchange. He did not allege that he did not want the book, the book was unsatisfactory, or the book was worth less than what he paid for it.

158 Cal. App. 4th at 855. Thus, although the plaintiff in *Hall* paid money

as the result of the alleged misrepresentation, the court held that plaintiff's payment did not constitute an injury in fact or loss of money. The *Hall* court's holding is not only consistent with, it directly supports, the Court of Appeal's decision in this case. (Op. at 9, 11).

In *Peterson*, the plaintiffs' UCL action was based on the allegation that they bought insurance policies from the defendant who was not licensed to sell such insurance. The plaintiffs argued that they had suffered injury in fact and had lost money because the insurance should not have been sold to them in the first place by the unlicensed defendant and because a portion of the premiums they paid were unlawfully retained by the defendant. 164 Cal. App. 4th at 1586-87. In affirming the trial court's dismissal of the action at the pleading stage on the ground that the plaintiffs had not shown that they suffered a monetary loss, the court of appeal rejected the plaintiffs' argument:

> Plaintiffs here do not allege they paid more for the insurance due to the defendant's collecting a commission. They do not allege they could have bought the same insurance for a lower price either directly from the insurer or from a licensed agent. Absent such an allegation, plaintiffs have not shown they suffered actual economic injury.

Id. at 1591. Again, the court found that although acts of unfair competition may have been committed on the plaintiffs, no actual economic injury was suffered by the plaintiffs, and therefore the plaintiffs lacked standing. The Court of Appeal in this case found that *Peterson* directly supported its decision. (Op. 9-11).

In *Animal Legal Defense Fund*, the consumer plaintiffs alleged that the defendant calf ranchers had mistreated calves in violation of California law, and that a UCL violation arose because the consumers "reasonably presumed" that the milk used to make the dairy products they

purchased came from calves treated in accordance with California law. 160 Cal. App. 4th at 140-41, 146. The consumers' alleged injury was that "they bought milk they otherwise would not have bought if they had thought some of the producing herd may have been raised by [defendants] in cruel conditions." *Id.* at 146. In affirming the trial court's order sustaining the defendants' demurrer without leave to amend, the court of appeal found that "the causal connection between wrongful conduct and injury is not apparent" and that "[e]conomic injury cannot be inferred from these allegations." *Id.* The Court of Appeal in this case found that the *Animal Legal Defense Fund* case supported its decision. (Op. at 12).

In *Walker*, the plaintiff auto body shop owner brought an action against an automobile insurance company claiming that the insurance company committed a UCL violation by refusing to pay the full amount set forth in the "estimates" plaintiff prepared for damaged automobiles belonging to the company's insureds. 474 F. Supp. 2d 1170-71. However, "[f]earing that he could lose the work to a better priced competitor, Plaintiff agreed to do the auto body work for less compensation than he initially demanded" in his estimates. *Id.* at 1171. The district court dismissed the plaintiff's UCL action because he suffered no monetary loss by agreeing to accept less money than he demanded in his estimates. The court found that the plaintiff failed to provide any authority "for the proposition that payment for auto body work not yet undertaken was owed the moment an estimate was executed." *Id.* at 1173. The holding in *Walker* is not in conflict with the Court of Appeal's decision in this case.

In *G & C Auto Body, Inc.*, plaintiff auto body repair companies brought a UCL claim against certain automobile insurers alleging that the labor rates that the insurers used to resolve claims of their insureds were below prevailing auto body rates and below the reasonable rates that the repair companies were entitled to charge. 2007 U.S. Dist.

Lexis 91327 *3. The plaintiffs also alleged that the insurers were steering their insureds away from doing business with the plaintiffs. *Id.* Plaintiffs alleged that they suffered monetary losses arising from (1) the insurers' failure to pay the full labor rates charged by plaintiffs for the repair work, and (2) lost business caused by the insurers directing their insureds away from plaintiffs' auto body shops. *Id.* at *6. The district court held that plaintiffs possessed standing to seek injunctive relief because the allegations of "unpaid accounts receivable" and "loss of business" reflected an alleged loss of money that had "a direct causal connection to" the alleged unlawful competition. *Id.* at *11. This holding is not in conflict with the Court of Appeal's decision in this case.

The Court of Appeal here also identified two other cases that are consistent with, and directly support, its decision, *Medina v. Safe-Guard Products, International, Inc.,* 164 Cal. App 4th 105 (2008) and *Chavez v. Blue Sky Natural Beverage Co.*, 503 F. Supp. 2d 1370 (N.D. Cal. 2007). (Op. at 10-11). In *Medina*, the plaintiff bought a "tire and wheel service" insurance contract from the defendant who was not licensed to sell such insurance contracts. The plaintiff asserted a UCL class action claim predicated on the defendant's unlawful practice of selling insurance contracts without a license to do so. The plaintiff argued that his "payment for the contract, *by itself*, is sufficient to show 'injury in fact.'" 164 Cal. App 4th at 114. The court rejected the plaintiff's argument and affirmed the trial court's dismissal of the action at the pleading stage: "[plaintiff] has not alleged that he didn't want wheel and tire 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 unlicensed status of [defendant]." *Id.* In other words, the *Medina* court concluded that the plaintiff suffered no economic loss as a result of the purchase even though an act of unfair competition may have been

committed on the plaintiff.

In *Chavez,* the plaintiffs brought a UCL, FAL, and CLRA action based on the allegation that they were induced to buy defendant's Blue Sky beverages as the result of the defendant's misrepresentations that the beverages were made in New Mexico. The named plaintiff alleged that he "'would not have purchased Blue Sky Beverages had he known where they were really manufactured and/or where the company that owned or controlled the canning of Blue Sky Beverages was located.'" 503 F. Supp. 2d at 1372 (quoting the complaint). The plaintiffs asserted that their monetary loss "equal[ed] the amount paid for the Blue Sky beverages because they would not have purchased the drinks had they known the drinks and company were no longer related to" New Mexico. *Id.* at 1373. The district court dismissed the action at the pleading stage because plaintiffs had not alleged an actual economic loss:

> Plaintiffs' alleged injury and damages are nonexistent because Defendants' alleged promise had no value. In other words, Plaintiffs have not alleged damages resulting from Defendants' supposed misrepresentation of the location of its bottling operations and/or corporate headquarters.
>
> . . . .
>
> . . . . Plaintiff did not pay a premium for Defendants' beverages because the drinks purportedly originated in Santa Fe, New Mexico. Accepting the facts as stated by Plaintiffs and drawing all inferences in their favor, Defendants' promise concerning geographic origin had no value and Plaintiffs have suffered no damages by purchasing beverages they thought were produced in New Mexico by a New Mexico-based company, but actually originated in California. As a result of Plaintiffs' failure to allege any damages under

> all four causes of action, Plaintiffs have no standing to pursue their claims against Defendants.

Id. at 1374. Thus, the district court held that although the plaintiffs had paid money for products they purchased as a result of a misrepresentation, the plaintiffs did not suffer an actual economic injury because the misrepresentations did not result in them being charged a "premium" for the products.

In sum, the Court of Appeal's decision does not conflict with any other California or federal court decisions and does not present an important unsettled question of law. Review should be denied.

B. The Court Of Appeal's Decision To Deny Plaintiffs Leave To Amend Their Complaint Yet Again Does Not Conflict With Any Case And Does Not Raise An Important Unsettled Question Of Law

Plaintiffs assert that the Court of Appeal's "denial of leave to amend contravenes *Branick* and other settled precedent liberally favoring amendment." (Pet. at 25 [*see* section heading]). Once again, however, Plaintiffs fail to provide any support for their assertion. Moreover, the record establishes that Plaintiffs' assertion lacks merit.

On February 10, 2005, the Court of Appeal vacated the Original Judgment because Proposition 64 revoked plaintiff Benson's standing, and remanded the matter to the Superior Court with directions to permit plaintiff Benson to move for leave to file an amended complaint alleging facts establishing his standing under Proposition 64. *Benson v. Kwikset Corp.*, 126 Cal. App. 4th 887, 927 (2005).

Plaintiff Benson and Kwikset both petitioned for review, and on April 27, 2005, this Court granted plaintiff Benson's petition which

questioned the correctness of the Court of Appeal's application of Proposition 64 to this case. This Court ordered further action in the matter deferred pending its consideration and disposition of *Californians For Disability Rights v. Mervyn's, LLC. See Benson v. Kwikset Corp.*, 2005 Cal. LEXIS 4587 (2005).

On April 11, 2007, this Court transferred this matter back to the Court of Appeal "with directions to vacate its decision and to reconsider the cause in light of *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal. 4th 235 [46 Cal. Rptr. 3d 66, 138 P.3d 214]." *See Benson v. Kwikset Corp.*, 2007 Cal. LEXIS 3728 (2007) and *Benson v. Kwikset Corp.*, 2007 Cal. LEXIS 6537 (2007).

On June 29, 2007, the Court of Appeal vacated the Original Judgment in favor of plaintiff Benson on the ground that he had not established his standing under Proposition 64. However, in accordance with this Court's directions and its decision in *Branick v. Downey Savings & Loan Assn.*, 39 Cal. 4th 235 (2006), the Court of Appeal remanded this case to the Superior Court "with directions to afford plaintiff an opportunity to move for leave to file an amended complaint that alleges facts establishing the standing and representative action requirements for unfair competition law and false advertising law claims as implemented by Proposition 64." *Benson v. Kwikset Corporation*, 158 Cal. App. 4th 1254, 1284 (2007). The Court of Appeal also directed the Superior Court to either (1) reimpose the Original Judgment if plaintiff pled and proved his standing under Proposition 64, or (2) dismiss this action "[i]f plaintiff fails to plead or prove his right to maintain this lawsuit" under Proposition 64. *Id.*

On remand, Plaintiffs were permitted to file first and second amended complaints in an effort to adequately allege their standing under Proposition 64. (Pet. Exs. 9, 25).

After determining that Plaintiffs had failed to satisfy the "lost money" requirement of Proposition 64, the Court of Appeal denied Plaintiffs' request for leave to amend their complaint yet again for several reasons. First, the Court of Appeal found that many published cases were available "to inform [Plaintiffs] what factual allegations were necessary" to support their standing, and that Plaintiffs "were on notice that merely alleging they purchased [Kwikset's] locksets in reliance on the products' false labels would not suffice to establish standing."[2] (Op. at 14). Second, the Court of Appeal found that although Plaintiffs asserted in their Return that there existed evidentiary support for their proposed amendments (*see* Return at 43), Plaintiffs "fail[ed] to provide any citation to the record or present any documentation to support" that assertion. (Op. at 14). Third, the Court of Appeal found that the trial record failed to support Plaintiffs' proposed amendments. (*Id.*). As an example, the Court of Appeal noted that although plaintiff Benson alleged in the SAC that he bought Kwikset locksets for himself and was not reimbursed, his sworn pre-trial and trial testimony reflected that he had been reimbursed by his clients for those lockset purchases. (*Id.*). Fourth, the Court of Appeal found that Plaintiffs' theory that they could allege a monetary loss eligible for restitution was unsustainable in that the Superior Court had already denied restitutionary relief because Plaintiffs and consumers had used Kwikset's locksets "'without other complaint.'" (Op. at 14-15). In light of these factors, the Court of Appeal concluded that Plaintiffs had "failed to show a reasonable possibility they could *truthfully* amend the complaint to allege facts establishing their standing to maintain this action." (Op. at 15 (emphasis

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[2] In their motion for leave to file their SAC, Plaintiffs conceded that several cases had been decided by the courts of appeal "further elucidating the Proposition 64 requirements" for standing. (Pet. Ex. 21 at 429 ll. 3–4, 12–14).

added)).

In sum, nothing about the Court of Appeal's denial of leave to amend contravenes *Branick* or any other settled precedent. Plaintiffs were given an opportunity in accordance with *Branick* to amend their complaint to adequately allege their standing, and they failed to do so. Review should be denied.

C. Review Is Also Inappropriate Because The Sole Potential Beneficiaries Of This Purported Consumer Class Action Are Plaintiffs' Attorneys

This case is inappropriate for review because the apparent motivation for its continued prosecution is Plaintiffs' desire to recapture the Superior Court's $2.9 million attorney fees award. If Plaintiffs had been able to establish their standing and satisfy the class action requirements of section 382 of the Code of Civil Procedure (as required by Proposition 64), the Original Judgment would have been reentered. *Benson*, 152 Cal. App. 4th at 1284. The Original Judgment, however, would provide no relief to Plaintiffs or the proposed class of past purchasers they seek to represent. Although the Original Judgment provided $2.9 million to Plaintiffs' attorneys, it provided no monetary relief to Plaintiffs or the proposed class members. (Pet. Ex. 10 at 277-78). Restitution for past purchasers (i.e., the proposed class members) was expressly denied by the Superior Court. (Pet. Ex. 10 at 275). The Original Judgment's injunction prohibiting Kwikset from mislabeling its locksets in the future would not benefit the Plaintiffs or the proposed class members because they purchased their locksets between 1996 and 2000. (Pet. Ex. 21 at 452). In any event, Kwikset ceased selling "Made in USA" labeled locksets by October of 2000, over eight years ago. *Benson*, 152 Cal. App. 4th at 1265. Thus, even if Plaintiffs were able to establish their standing under Proposition 64, the only potential

beneficiaries of this purported consumer class action would be Plaintiffs' attorneys. For this reason alone, review should be denied.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff's Petition For Review should be denied.

Dated: April 20, 2009

JONES, BELL, ABBOTT, FLEMING & FITZGERALD L.L.P.
Michael J. Abbott
Fredrick A. Rafeedie
William M. Turner

By: Fredrick A. Rafeedie
FREDRICK A. RAFEEDIE
Attorneys for Petitioners and Answering Parties Kwikset Corporation and The Black & Decker Corporation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.504(d), and in reliance upon the word count feature of the software used, I certify that the attached ANSWER TO PETITION FOR REVIEW contains 4,914 words, exclusive of those materials not required to be counted under Rule 8.504(d).

Dated: April 20, 2009

JONES, BELL, ABBOTT, FLEMING & FITZGERALD L.L.P.
Michael J. Abbott
Fredrick A. Rafeedie
William M. Turner

By: _____
FREDRICK A. RAFEEDIE
Attorneys for Petitioners and Answering Parties Kwikset Corporation and The Black & Decker Corporation

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 601 South Figueroa Street, Twenty-Seventh Floor, Los Angeles, California 90017-5759.

On April 21, 2009, I served the foregoing document(s) described as: **ANSWER TO PETITION FOR REVIEW**

☒ **BY MAIL:** I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

☐ by placing a true copy thereof in sealed envelope(s) addressed as stated on the attached "SERVICE MAILING LIST."

☒ by placing a true copy thereof in sealed envelope(s) addressed as follows:

Honorable David C. Velasquez (1 Copy)
Department CX-101
Superior Court of the State of California
County of Orange
Civic Complex Center
751 West Santa Ana Boulevard
Santa Ana, California 92701

Clerk of the Court (1 Copy)
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Executed on April 21, 2009, at Los Angeles, California.

Charlotte E. Van Buren

CHARLOTTE E. VAN BUREN