SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

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| Hoffman v. American Express | 2001-022881 |
| Turner v. Allstate | 2002-046665 |
| Ryan Hanan v. Ford | HG03-086629 |
| Cellphone Termination Fee Cases | JCCP 004332 |
| Cross Country Bank Cases | JCCP 004380 |
| Turner v. State Farm | RG03-078358 |
| Turner v. Farmers Ins. Co. | RG03-078362 |
| Goldman v. Furniture Traditions | RG03-083217 |
| FATE v. Covenant Care | RG03-087211 |
| FATE v. Ember Care | RG03-087224 |
| FATE v. GranCare | RG03-103363 |
| The Utility Consumers Action Network v. Pacific Bell | RG04-174050 |
| Center For Biological Diversity, Inc. v. FPL | RG04-183113 |

ORDER (1) GRANTING MOTIONS TO STRIKE UCL CLAIMS ASSERTED BY PRIVATE PARTIES IN THE INTEREST OF THE GENERAL PUBLIC; (2) PERMITTING GOVERNMENT ENTITIES LEAVE TO INTERVENE TO REPRESENT THE GENERAL PUBLIC; (3) GRANTING AND DENYING MOTIONS TO STRIKE UCL CLAIMS ASSERTED BY PRIVATE PARTIES IN THEIR OWN INTERESTS; and (4) GRANTING LEAVE TO AMEND AND TO FILE MOTIONS FOR LEAVE TO AMEND.

Date: February 10, 2004
Time: 9:00 am

PROCEDURE AND PRELIMINARY NOTES.

These motions concern how to apply the statutory amendments made in Proposition 64 to cases that were filed on or before November 2, 2004. The Court frames the issues in ways that were not addressed directly by the parties in their initial briefs so it issued a tentative decision on January 28, 2005, and permitted Plaintiffs, Defendants, the Attorney General, and the Alameda County District Attorney to file briefs to address the tentative basis for the Court's decision. See *Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 860.

After the Court issued its tentative decision of January 28, 2005, three separate Districts of the Court of Appeal issued decisions that that address the Proposition 64 issues: *Californians for Disability Rights v. Mervyn's ("Mervyn's"*) (February 1, 2005) 2005 Cal. App. LEXIS 160; *Branick v. Downey Saving & Loan Assn.* (February 9, 2005) 2005 Cal. App. LEXIS 201; and *Benson v. Kwikset Corp.* (February 10, 2005) 2005 Cal. App. LEXIS 208. All three decisions were certified for publication and can be cited and relied upon. C.R.C. 977(d). These decisions reached inconsistent results. Where Courts of Appeal are in conflict a trial court may consider the different authorities and reach its own conclusions. *Sears v. Morrison* (1999) 76 Cal. App. 4th 577, 587 ("Where California intermediate appellate court cases conflict, any trial court may choose the decision it finds most persuasive."); *Richards v. Miller* (1980) 106 Cal. App. 3d Supp. 13, 17 ("As the appellate decisions are conflicting, we are at liberty to choose what we believe to be the better rule.")

After holding a hearing on February 10, 2005, and considering the arguments of counsel in all of the above cases, the Court reaches a conclusion that is different in approach but identical in effect to *Branick* and *Benson*. The Court explains its analysis for whatever assistance it may be to the Court of Appeal. *People v. Willis* (2002) 27 Cal. 4th 811, 817-821 (considering the

concerns of the lower courts). The analysis in *Mervyn's*, *Branick*, and *Benson* focused on how Proposition 64 affected the named plaintiff in those cases. This Court focuses on the different issue of how Proposition 64 affects the real parties in interest.

SUMMARY.

Proposition 64 changed who can prosecute claims under the UCL. How Proposition 64 affects any given case depends on the identity of the named plaintiff and the identity of the real party in interest.

The Attorney General and other public officials can continue to prosecute UCL claims in the interest of the People of the State of California.

Private persons can no longer prosecute UCL claims in the interest of the general public. To ensure that the general public can continue to prosecute legitimate claims, the Court permits the Attorney General and other public officials leave to intervene and continue the prosecution of UCL claims in the interest of the public.

Private persons can continue to prosecute UCL claims in their own interest, but only if they have suffered injury in fact and have lost money or property as a result of the unfair competition. The Court grants plaintiffs leave to amend to allege injury in fact and loss of money or property. The Court permits plaintiffs to file motions for leave to file amended complaints to add new parties, add new claims that concern the same occurrence or event, and otherwise restate their claims.

Private persons prosecuting UCL claims in their own interest may continue to represent classes of similarly situated persons under C.C.P. 382.

The overall result is that UCL claims in the interest of the general public must now be prosecuted by government entities and claims by private persons that were in the interest of the general public may be restated as class claims and prosecuted as private claims.

PROSECUTION OF UCL CLAIMS BEFORE PROPOSITION 64.

Before Proposition 64, three different types of plaintiffs could prosecute UCL claims: (1) the Attorney General or any other public entity in the interest of the People of the State of California; (2) private parties in the interest of the general public; and (3) private parties in their own interest. These three categories of cases were expressly identified in former Business and Professions Code 17204.

PROPOSITION 64.

Proposition 64 was approved by the general public in an election on November 2, 2004, and became effective the next day. Cal. Const. Art. II, § 10 (a) ("An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise.")

Proposition 64 contains nine separate sections: section 1 is the "Findings and Declaration of Purpose," sections 2-6 are statutory amendments; and sections 7-9 concern the application of the statutory amendments. The statutory amendments concern Business and Professions Code sections 17203, 17204, 17206, 17535, and 17536. The amendments to a single statutory section can concern more than one issue. Specifically, the amendment to section 17204 both eliminates the right of a private person to represent the general public and requires a person bringing a UCL

claim in his or her own interest to meet heightened standing requirements. This Court considers each issue separately.

INTERPRETIVE TOOLS AND PURPOSE OF PROPOSITION 64.

As directed by *People v. Canty* (2004), 32 Cal. 4th 1266, 1276-1277, the Court interprets Proposition 64 using the same principles that govern the construction of a statute. The Court first examines the language of the proposition and gives the words their usual, ordinary meaning. If the language is clear and unambiguous, the Court follows the plain meaning of the measure. This "plain meaning" rule does not, however, prohibit a court from examining whether the literal meaning of a measure comports with its purpose. The language is construed in the context of the measure as a whole. The intent of the law prevails over the letter of the law and the letter will, if possible, be read to conform to the spirit of the act.

Given the importance of the intent and spirit of the law, the Court considers the "Findings and Declaration of Purpose" in Proposition 64, Section 1, and the voter information guide. *People v. Canty* (2004) 32 Cal. 4th 1266, 1280 (statements of intent, while not conclusive, are entitled to consideration); *Hayward Area Planning Assn. v. Alameda County Transportation* (1999) 72 Cal. App. 4th 95, 104-105 (courts can use the ballot analysis, the official summary, and the arguments presented to the voters when interpreting voter-approved enactments).

The Court finds that the central purpose of Proposition 64 is to ensure that only public entities prosecute UCL claims in the interest of the general public. Proposition 64 was intended to close the standing "loophole" in former section 17204 that "no other state allows" that permitted private persons to "'appoint' themselves to the act like the Attorney General." Ballot Argument in Favor of Proposition 64. In contrast, Proposition 64 expressly permits private

parties to continue pursuing private UCL claims to recover compensation for actual injuries and permits those parties to pursue class actions. The Court finds that electorate intended to immediately transfer the prosecution of claims in the interest of the general public from private parties to public entities.

PROPOSITION 64's EFFECT ON SUBSTANTIVE LAW.

Proposition 64 did not affect change the UCL's standards for permissible conduct. Any act that was unlawful, unfair, or fraudulent under the UCL before November 3, 2004, remains unlawful, unfair, or fraudulent.

PROPOSITION 64'S EFFECT ON WHO CAN PROSCUTE A UCL CLAIM.

The primary effect of Proposition 64 was to change who can prosecute a UCL claim. As it reads after the adoption of Proposition 64, section 17204 states, "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction [1] by the Attorney General or any district attorney … in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or [2] by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." The amendment deletes the words that permitted private persons to prosecute UCL claims in the interest of the general public and adds words that require private persons who prosecute UCL claims in their own interest to have suffered actual injury.

The Court focuses on the word "prosecuted" in section 17204. California courts have held consistently that "prosecution" includes every aspect of a case through final judgment. See

*Ramos v. Superior Court* (1982) 32 Cal. 3d 26, 36 ("The term "prosecution" is sufficiently comprehensive to include every step in an action from its commencement to its final determination."). See also *Melancon v. Superior Court of Los Angeles County* (1954) 42 Cal. 2d 698, 707-708. This definition of "prosecution" is also implicit in Code of Civil Procedure 583.110 et seq (especially 583.420) and California Rule of Court 373 (especially subsection (e)), regarding the dismissal of cases for delay in prosecution. The Code of Civil Procedure and Rules of Court are not concerned with delay in filing a case (which is covered by the statute of limitations), but the delay in bringing the case to trial after it has been filed.

The Court's inquiry is on who is authorized to "prosecute" claims on behalf of which real parties in interest.

CLAIMS BY PUBLIC PROSECUTORS IN THE INTEREST OF THE PEOPLE OF THE STATE OF CALIFORNIA.

When government entities pursue UCL claims in the name of the people of the State of California, the UCL claims are in the nature of law enforcement actions. *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17 (UCL claim by the Attorney General "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties."). The government entities act as representatives of the people as an indivisible whole. *People v. Eubanks* (1996)14 Cal.4th 580, 589-590 ("The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People.")

Proposition 64 did not change the ability of the Attorney General, any district attorney, or any authorized government entity to "prosecute" a UCL claim in the name of the people of the State of California. This is clear from Section 1(g) of Proposition 64, which states "It is the

intent of California voters in enacting this act that Attorney General, district attorneys, county counsels, and city attorneys maintain their protection authority and capability under the unfair competition laws."

CLAIMS BY PRIVATE PERSONS IN THE INTEREST OF THE GENERAL PUBLIC.

Proposition 64 transfers the prosecution of UCL claims in the interest of the general public from private parties to public entities. In reaching that conclusion, the Court examines (1) who was the real party in interest when a claim was asserted "in the interest of" the general public, (2) what is "the general public," (3) who represents "the general public," and (4) did "the general public" intend to change how it would be represented in legal proceedings before getting to (5) whether the general public intended to permit private parties to represent it after Proposition 64.

WHO WAS THE REAL PARTY IN INTEREST WHEN A PRIVATE PARTY ASSERTED A UCL CLAIM IN THE INTEREST OF THE GENERAL PUBLIC?

When private parties asserted UCL claims in the interest of the general public the real party in interest was the general public.

Before Proposition 64, Section 17203 read, "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction … by any person acting for the interests of … the general public." The plain language of the statute suggested that when a private party pursued a UCL claim in the interest of the general public, the real party in interest was not the named plaintiff but "the general public."

In the first case to apply this language, *Hernandez v. Atlantic Finance Co.* (1980) 105 Cal. App. 3d 65, stated, "[W]e read the statute as expressly authorizing the institution of action by any person on behalf of the general public. The Legislature has provided that suit may be brought by any person acting in his own behalf *or* on behalf of the general public." The Court then distinguished actions on behalf of the general public prosecuted by a private attorney general with a class action where the named plaintiff has suffered damages, is pursuing his or her own claim, and seeks to represent similarly situated persons. This suggests that the court considered claims in the interest of the public as distinct from claims in the interest of the named plaintiff. See also *Prata v. Superior Court* (2001) 91 Cal. App. 4th 1128, 1138-1139 (claim in interest of general public is distinct from claim in interest of named plaintiff).

A claim by a private person in the interest of the general public is similar to a claim by a government official in the interest of a state department or agency – the former may be the named party but the latter is the real party in interest. Federal Rule of Civil Procedure 25(d)(1), regarding substitution of parties, acknowledges this and states, "when a public officer is a party to an action in an official capacity and during its pendency … ceases to hold office, then the action does not abate and the officer's successor is automatically substituted as a party."

The Court observes that the role of the general public in claims "in the interest of the general public" could have been clarified by earlier attention to C.C.P. 367. This section states, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." UCL jurisprudence might have developed differently if actions "in the interest of the general public" had been captioned "*THE GENERAL PUBLIC ex rel. Jane Plaintiff v. ACME CO.*" instead of "*JANE PLAINTIFF in the interest of the general public v.*

*ACME CO*." Although private parties that assert UCL claims in the interest of the general public may devote time and energy to the claims, the real party in interest is the general public.

WHAT IS THE "GENERAL PUBLIC"?

When a private plaintiff brought a UCL claim in the interest of the general public under former Business and Professions Code 17204, the plaintiff represented the public as a whole.

The "general public" has the same meaning as the "People of the State of California" under Government Code 100(a). The common understanding of both terms is the same. This common understanding is demonstrated in the ballot materials for Proposition 64 where the Attorney General used the terms "People of the State of California" and "general public" interchangeably. The "Official Title and Summary" states that Proposition 64 "Authorizes only the California Attorney General or local government prosecutors to sue on behalf of the general public to enforce unfair competition laws." In fact, the Attorney General actually represents the People of the State of California. The ballot arguments also demonstrate that the terms are interchangeable. The Argument in Favor of Proposition 64 states, "Shakedown lawyers 'appoint' themselves to act like the Attorney General and file lawsuits on behalf of the people of the State of California... ." In fact the UCL actually permitted private parties to appoint themselves to represent the general public.

There is no alternate definition of "the general public" that makes sense. The "general public" cannot reasonably mean "the injured members of the public" because a set of specific defined members of the public is not "the general public." See also C.C.P. 1021.5 (referring in the alternative to "the general public or a large class of persons.") The "general public" can mean only "the People as a body," "all the People" or "the People at large" and cannot mean just

those individuals directly interested in the outcome of a specific claim. *People v. Eubanks* (1996) 14 Cal. 4th 580, 589-590.

In addition, the claim preclusion (res judicata) effect of judgments in favor of "the general public" is consistent with the effect of judgments in favor of public entities. When a public entity such as the California Coastal Commission, the Attorney General, or the EEOC brings a claim in the public interest and obtains a judgment, the judgment generally has claim preclusion effect on subsequent private claims for injunctive relief but does not bar private claims for monetary relief. *Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal. App. 4th 1053, 1072-1073 (CCC's settlement involving injunctive relief bars subsequent private claim for injunctive relief); *Payne v. National Collection Systems, Inc.* (2001) 91 Cal. App. 4th 1037 (judgment on UCL claim brought by Attorney General does not bar private claims for monetary relief); *Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal.App.4th 454 (E.E.O.C.'s settlement does not bar private claims for monetary relief). See also Penal Code 1204.4(f) and (j) (effect of restitution to victims in criminal cases). This general approach has been applied to UCL claims by private persons in the interest of the general public. See *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal. 4th 303, 316 (injunctive relief obtained by the general public is designed "to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff"); *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal. 4th 116, 138 (monetary relief obtained by the general public is set off against and subsequent claims by private persons).

That said, the definition of the "general public" is open to dispute. Several cases touch on the definition of the "the general public," but none has addressed the issue directly. *People v.*

*Ault* (2004) 33 Cal. 4th 1250, 1268 ("It is axiomatic that cases are not authority for propositions not considered.")

In *Kraus, supra*, the Court indicates that UCL claims not certified as class actions could nevertheless be "brought on behalf of absent persons." Id at 121. See also *Kraus* at 126 fn 10, and 138 fn 18. There is no statutory basis for these statements and the Court seemed to be taking the allegations of the complaint as true. See *Kraus* at 125 fn 9. Alternatively, the Court could have simply been acknowledging the reality that claims prosecuted by the general public for public purposes can result in incidental benefits (restitution) to the injured members of the public. See, e.g. Penal Code 1204.4(f) and (j).

*Rosenbluth International, Inc. v. Superior Court* (2002) 101 Cal. App. 4th 1073, could be read as holding that only consumers are member of the general pubic. The Court understands *Rosenbluth's* rationale to be that the named plaintiff was not competent to represent the injured persons (large corporations), not that the injured persons were not members of the general public. Corporations are members of the general public and are entitled to the protection of California law. *Eubanks, supra* (criminal prosecution for theft of trade secrets from corporation).

There is also case law suggesting that UCL claims by private persons in the interest of the public are not as "public" as claims by public prosecutors. *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal. 4th 1132, 1154 n12, *Net2phone, Inc. v. Superior Court* (2003) 109 Cal. App. 4th 583, 587, and *Payne v. National Collection Systems, Inc.* (2001) 91 Cal. App. 4th 1037, 1044-1047. These cases suggest implicitly that the "People of the State of California" has a different meaning than the "general public," but they do not explain why there is a difference or what that difference might be.

Based on the use of the terms in the ballot initiative and in the absence of any reasonable alternative definition, the Court concludes that the "general public" in former section 17204 had the same meaning as the "People of the State of California."

WHO REPRESENTS "THE GENERAL PUBLIC"?

Before Proposition 64, section 17204 permitted private persons to prosecute actions on behalf of the general public.[1]

Former section 17204 was a departure from the ordinary course of things, where the Executive branch enforces laws in the interest of the public. Cal. Const., art. V, § 13 ("It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced."); Government Code § 26500 ("The district attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.") See also *People v. Oakland Water Front Co.* (1879) 118 Cal. 234, 239 (the attorney general has the authority and power to institute or prosecute proceedings in the name or on behalf of "the people of the state").

DID THE GENERAL PUBLIC INTEND TO CHANGE HOW IT WOULD BE REPRESENTED IN THE COURTS?

The amendment to section 17204 in Proposition 64, the "Findings and Declaration of Purpose" in Proposition 64, Section 1, and the ballot statement all suggest that the people

intended to eliminate the ability of private persons to prosecute actions on behalf of the general public and intended to transfer that authority to public officials.

The amendment to section 17204 removes the statutory grant of permission for private persons to represent the general public. Repealing a grant of permission is an unambiguous action.

The "Findings and Declaration of Purpose" in Proposition 64, Section 1, states that some private attorneys were filing "lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision." Section 1(b)(4). The section then states, "It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." Section 1(f). This indicates that the people wanted to transfer the authority for prosecuting claims in the interest of the public from unaccountable and unsupervised private attorneys to government officials.

The arguments in the voter information guide echo this purpose. The Argument in Favor of Proposition 64 states:

> Shakedown lawyers 'appoint' themselves to act like the Attorney General and file lawsuits on behalf of the people of the State of California, demanding thousands of dollars from small businesses that can't afford to fight in court.
>
> * * *
>
> Here's why 'YES' on Proposition 64 makes sense: …
> * Allows only the Attorney General, district attorneys, and other public officials to file lawsuits on behalf of the People of the State of California to enforce California's unfair competition law.

[1] There are other examples where the general public has, through the Legislature or by initiative, enacted laws that permit private persons to prosecute actions on behalf of the general public. See Health and Safety 1430(a) (regulation of long term care facilities); Health & Safety 25249.7 (Proposition 65).

The Rebuttal to Argument Against Proposition 64 states:

> Here's what 64 really does:
> * Stops fee-seeking lawyers from exploiting a loophole in California law - A LOOPHOLE NO OTHER STATE HAS – that lets them 'appoint' themselves to act like the Attorney General and file lawsuits on behalf of the people of the State of California."
> * Permits only real public officials like the Attorney General or District Attorneys to file lawsuits on behalf of the People of the State of California.

As directed by *Canty*, 32 Cal. 4th at 1276-1277, the Court's role is to ascertain the electorate's intent so as to effectuate the purpose of the law. This Court finds a clear expression by the electorate that it wanted claims in the interest of the general public to be prosecuted only by "real public officials."

DID THE GENERAL PUBLIC INTEND TO PERMIT PRIVATE PARTIES TO REPRESENT IT AFTER THE PASSAGE OF PROPOSITION 64?

The focus of these motions is on how the general public expected to be represented in cases that were filed by private parties in the interest of the public before November 3, 2004.

The amendments to the statute are ambiguous. The amendment to section 17204 did not add or delete any language regarding the filing or prosecution of lawsuits. The phrase "shall be prosecuted exclusively" was in section 17204 before November 3, 2004, and was unchanged by Proposition 64. Although the Court would presume that the Legislature was aware that the definition of "prosecution" is every step in an action from its commencement to its final determination, the Court cannot presume that the electorate is familiar with existing statutory and case law. *McLaughlin v. State Bd. of Education* (1999) 75 Cal. App. 4th 196, 214.

The "Findings and Declaration of Purpose" suggest the public intended Proposition 64 to apply to pending cases. Section 1(f) states, "It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." This could be read as either (1) only public entities are authorized to file and to prosecute actions on behalf of the general public or (2) only public entities are authorized to file [new actions on behalf of the general public] and to prosecute actions [previously filed by public entities] on behalf of the general public [but private entities that previously filed actions on behalf of the general public may continue to prosecute those actions]. The former interpretation is sensible and the latter interpretation is strained.

The ballot arguments strongly suggest that the general public wanted to be represented only by public entities immediately. The Argument in Favor states:

> Here's why a 'YES' on Proposition 64 makes sense: …
> · Stops these shakedown lawsuits …
> · Settlement money goes to the public, not the pockets of unscrupulous trial lawyers.

The Rebuttal to Argument Against Proposition 64 states:

> Here's what 64 really does: …
> · Stops Abusive Shakedown Lawsuits …
> · Stops trial lawyers form pocketing FEE AND SETTLEMENT MONEY that belongs to the public.

The statements that Proposition 64 will "stop" the "shakedown lawsuits" suggest that the effect will be immediate. "Stop" is a non-technical word that means "stop." There is no room for confusion or ambiguity, as there might be with words like file, prosecute, and sue. See generally *TrafficSchoolOnline, Inc. v. Clarke* (2003) 112 Cal. App. 4th 736, 741 (When interpreting statute, "'No' means no."); *People v. Augustin* (2003) 112 Cal. App. 4th 444, 452

("As the trial court noted, the victim's "agreement or lack thereof, her disagreement, specifically, is pretty obvious. It's pretty clear when she says yes, she means yes; when she says no, she means no.""). The statements that Proposition 64 will stop private counsel from being paid from the settlement of UCL claims so that all settlement funds can be distributed to the aggrieved members of the public suggest that the new law was intended to affect settlements in pending cases.

The ballot arguments frequently use the word "file" rather than the word "prosecute." Although the word "file" raises legitimate questions about whether the new amendments should apply only to the "filing" of new cases, the Court does not find the use of the word "file" to be material given that the actual statute uses the word "prosecute" and section 1(f) states that only public officials will be authorized to "file and prosecute" UCL claims on behalf of the public. *Mervyn's* holds that the "isolated" references to "filing" in the ballot arguments are "far from decisive." (Slip Op at 4.) The Court also notes that the Attorney General's Summary uses the word "sue," which Black's Law Dictionary defines as "to commence or continue legal proceedings for recovery of a right." See *Lervold v. Republic Mut. Fire Ins. Co.* (Kan 1935) 45 P.2d 839, 843.

The Court concludes that the electorate intended that after November 2, 2004, only public officials would prosecute UCL claims in the interest of the general public. Given that the Court's purpose is to implement the intent of the electorate, *Canty, supra,* 32 Cal. 4th at 1276-1277, the Court thinks that this is the soundest basis for its decision.

The *Branick*, and *Benson* decisions reached the same result by holding that Proposition 64 repealed the statutory ability of private persons to represent the public, and that under Government Code § 9606, the repeal affected all pending cases. The Court finds their reasoning

compelling as well, although it focuses on the effect of Proposition 64 on the named plaintiff and not on the real party in interest – the general public.

THE GENERAL PUBLIC MAY CONTINUE TO PROSECUTE CLAIMS UNDER THE UCL THROUGH THE ATTORNEY GENERAL AND/OR LOCAL PUBLIC OFFICALS.

The amendment to section 17204 by Proposition 64 did not eliminate claims in the interest of the general public or direct that they be dismissed - it changed the law so that only the Attorney General and local public officials can prosecute actions on behalf of the general public.

Proposition 64 states that "some private attorneys" are misusing the UCL. Section 1(b). The word "some" is important because it suggests that other private attorneys have filed and are pursuing legitimate UCL claims in the interest of the general public. To ensure that legitimate claims are pursued on behalf of the general public, the Court will permit the California Attorney General and local public officials to continue the prosecution of actions on behalf of the general public. This will provide the accountability that was lacking previously, section 1(b(4), and permit government entities to assume the public protection authority and capability intended by the voters, section 1(g). The government officials may elect to continue the prosecution of all, some, or none of the affected cases. *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal. App. 4th 963, 976 (in enforcing the UCL, "prosecutors have broad discretion to choose which defendants to prosecute").

On or before February 25, 2005, Plaintiff must serve on the Attorney General and the Alameda County District Attorney a notice stating the nature of any claim in the interest of the general public and the status of the litigation. On or before February 25, 2005, Plaintiff must file with the Court a declaration stating that the government entities have been served with the

notice. The actual notice is in the nature of a communication regarding the substitution of counsel and need not be filed. On or before May 6, 2005, the Attorney General and/or the Alameda County District Attorney may intervene in any case to prosecute claims in the interest of the general public. If a government entity has not appeared to represent the interests of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed as of the close of business on May 6, 2005.

OTHER ISSUES CONCERNING CLAIMS IN THE INTEREST OF THE GENERAL PUBLIC.

The Court has considered the many arguments of the parties who set their Proposition 64 motions for February 10, 2005.

Various plaintiffs argued that Proposition 64's amendment to section 17204 could not be retroactive absent express language to the contrary. These arguments relied on authority holding that a new statute is generally inapplicable to pending actions if it is determined to affect "rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." *Aetna Cas. & Surety Co. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 391. Where private claims are at issue, there is a presumption that those claims are not forfeited when a statute is amended. *Evangelatos v. The Superior Court of Los Angeles County* (1988) 44 Cal.3d 1188, 1209. These arguments are met with three points.

First, UCL claims in the interest of the general public were always in the interest of the public as a whole. The named plaintiff was only a representative of the public and had no personal interest in the outcome of the litigation. Although named plaintiffs may have "acted in reliance on the then-existing state of the law" when they undertook to represent the public, they

have not been subjected to "unexpected and potentially unfair consequences" because they cannot pursue claims on behalf of the public. *Evangelatos,* 44 Cal.3d at 1217.

Second, under this Court's analysis, Proposition 64 would not affect the right of the public to pursue pending UCL claims.

Third, if Proposition 64 did prohibit the prosecution of claims by the general public (which it does not), the statute would apply retroactively. The general public, acting through the Legislature or through a ballot initiative, may presumably limit its own ability to assert claims against private persons. The claims most frequently asserted on behalf of the People of the State of California are criminal charges under the Penal Code. When there is a change in the Penal Code that limits liability or mitigates punishment and there is no saving clause, the general rule is that the amendment operates retroactively. The Courts presume that the Legislature is not motivated by a desire for vengeance and would not want the Executive branch to pursue charges or punishments that the Legislature has determined to not be in the interest of California. *People v. Figueroa* (1993) 20 Cal. App. 4th 65, 69-70; *People v. Nasalga* (1976) 12 Cal. 4th 784, 792. If, by approving Proposition 64, the people of the state of California decided that they did not want to pursue claims in the interest of the general public under the UCL (which they did not), then defendants should be entitled to the benefits of that change immediately.

Turning to the Defense arguments, the Court finds no merit to the argument that Proposition 64 repealed the general public's rights. Proposition 64 does not preclude the general public from prosecuting UCL claims or change the substantive law that applies to those claims, it only changes who may represent the general public.

The Court finds merit to the defense argument that Proposition 64's changes are procedural in nature insofar as they affect the general public. The amendment to section 17204

regarding claims by the general public "merely regulates the conduct of ongoing litigation." *Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal. App. 4th 679, 689. That said, changing the named plaintiff from a private party to a public official does not require the dismissal of claims in the interest of the public.

PRIVATE PERSONS PROSECUTING UCL CLAIMS IN THEIR OWN INTERESTS MUST NOW MEET THE REQUIREMENTS OF SECTION 17204.

Proposition 64 amended section 17204 to read, "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction … by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition."

The analysis related to UCL claims by private persons for their own interests is relatively straightforward compared to the analysis of UCL claims by private persons in the interest of the general public. The issue is whether plaintiffs pursuing a statutory claim must meet standing requirements that were added to the statute after the claim arose and after the action was filed. The *Mervyn's*, *Branick* and *Benson* decisions all approached the issues from this angle.

The general rule is stated in *McClung v. Employment Development Dept.* (2004) 34 Cal. 4th 467, 475 as follows, "Generally, statutes operate prospectively only. … [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly ... . For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal

appeal." Federal law is similar. See *Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal. 4th 828, 841; *Landgraf v. Usi Film Prods.* (1994) 511 U.S. 244, 316.

This general rule has three exceptions. First, the Legislature can expressly state that it intends a new law to govern conduct prior to the enactment of the law. *McClung*, 34 Cal.4th at 475. There is no express statement in Proposition 64 regarding UCL claims in the interest of private persons. As noted above, the focus of Proposition 64 was changing who could prosecute UCL claims in the interest of the public.

Second, the repeal of statutory claims (as opposed to common law claims) can be applied to pending actions. *Callet v. Alioto* (1930) 210 Cal. 65, 67-68. UCL claims for the benefit of private parties are statutory in nature and "cannot be equated with the common law definition of unfair competition." *Branick*, Slip Op at 14-15; *Benson*, Slip Op at 14. Because the UCL claims are statutory in nature, any repeal of a claim or change in the standing requirements is presumed to be effective immediately. *Branick* at 14-15; *Benson* at 15; Government Code § 9606. The Court finds the rationales of *Branick and Benson* compelling and follows their holdings.

Third, a procedural change that affects the means of getting a claim to trial but not the elements of the substantive cause of action can be applied to pending cases immediately. *Tapia v. Superior Court* (1991) 53 Cal. 3d 282, 287-91. Case law suggests that standing is procedural in nature because it concerns who may pursue a claim, not an element of the claim. *Parsons v. Tickner* (1995) 31 Cal. App. 4th 1513, 1523 (applying statutory change to standing requirements to pending case). Following this case law, the Court finds that the new standing requirement for

private parties pursuing private claims is procedural in nature and should be applied to cases pending on November 2, 2004.[2]

The Court must address *Mervyn*'s. *Mervyn's* does not state whether the UCL claims were brought by CDR ( the named plaintiff) on its own behalf, on behalf of its members, or on behalf of the public, making it difficult to determine whether CDR would have been deprived of its own UCL claim or of the opportunity to pursue a UCL claim on behalf of others. The Court agrees with the *Branick* and *Benson* analysis of how to apply Government Code 9606 to statutory claims and the observation in *Branick* that the right to bring a claim on behalf of the public was wholly statutory in nature. The Court notes that *Mervyn's* seems to recognize a property interest in the process of bringing a lawsuit on behalf of the public that is distinct from the underlying claim of the public. It would seem that a person who pursued a lawsuit on behalf of the public and was then told that his or her services were no longer wanted might have a claim against the public for the value of their work, but would not have an independent right to continue pursuing the lawsuit. The situation is somewhat analogous to a contractor who is entitled to a completion bonus at the end of a project and is terminated mid project – the contractor may sue the developer for compensation, but has no right to complete the project. A more apt analogy might be to a lawyer who undertakes work on a contingent fee case and is terminated by the client before the case is completed – the attorney may have a right to the fair value of his or her work, but has no right to continue pursuing the lawsuit.

The Court has considered *Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal. 4th 828, 841. *Myers* held that where the Legislature repeals a statutory limit on common law claims, the repeal

[2] *In re Daniel H.* (2002) 99 Cal. App. 4th 804, 809-812, is distinguishable because it concerned the creation of a new claim after the filing of a case, not a change in who had standing to pursue the claim.

does not expose defendants to liability for actions that were lawful at the time. In contrast, *Branick and Benson* hold that where the voters repeal statutory claims, the repeal can eliminate statutory liability for actions that were unlawful at the time. These cases suggest that the repeal of a statutory sword operates immediately and affects pending cases, but the repeal of a statutory shield does not revive claims in pending cases. Stated otherwise, the retroactivity analysis focuses on whether new legislation imposes a retroactive burden on potential defendants, not whether new laws deprive plaintiffs of statutory claims. *McClung*, 34 Cal.4th at 472 (Court's concern is whether retroactive application would "attach new legal consequences to events completed before its enactment" or would "increase a party's liability for past conduct ... .") *Myers* is distinguishable because the new legislation in that case would have increased the defendants' liability for past conduct, whereas applying Proposition 64 to pending cases would arguably decrease defendants' liability for past conduct.

The Court has considered *Hughes Aircraft Co. v. United States ex rel. Schumer* (1997) 520 U.S. 939. *Hughes* held that where the Legislature eliminates a statutory defense to a statutory claim, the repeal of the defense does not apply retroactively. This is consistent with the analysis in *McClung* and *Myers* that Courts are careful not to retroactively impose burdens on or retroactively remove defenses from potential defendants. *Hughes Aircraft* is similar to *Myers* because it holds that the repeal of a statutory shield does not apply to claims in pending cases. *Hughes Aircraft* is distinguishable from these cases because the repeal of a statutory sword can operate immediately.

The Court has considered the argument that Government Code 9606 is simply a statement of Legislative power, but not of legislative intent. The legislative power/legislative intent distinction is addressed by the cases holding that where statutory rights are at issue the

legislature presumably intends all legislation to be effective on its effective date and to apply immediately unless there is a contrary intent.

The Court has also considered that Proposition 64 does not deprive any named plaintiffs of their common law claims. The UCL was, and remains, a remedy in addition to all other remedies. Business and Professions Code 17205 and 17534.5. The continuing ability to pursue common law claims substantially limits any prejudice to the interests of the named plaintiffs. *Yoshioka v. Superior Court* (1997) 58 Cal. App. 4th 972, 981-982 ("Retrospective application of a statute is forbidden when at the very least the party is deprived of *every reasonable method of securing just compensation*.") A hypothetical plaintiff who loses the ability to pursue an individual UCL claim because she cannot plead or prove "injury in fact" and "lost money or property" has (by definition) not lost any money or property. A second hypothetical plaintiff who cannot meet the new standing requirement may be theoretically deprived of the ability to pursue injunctive or declaratory relief, but this is not of constitutional concern because one cannot have a vested interest in the ability to obtain prospective relief. This second hypothetical plaintiff is also probably not deprived of the ability to obtain injunctive or declaratory relief because he or she could still bring a common law tort claim and seek that relief.

THE COURT WILL PROVIDE PLAINTIFFS THE OPPORTUNITY TO SEEK LEAVE TO AMEND TO MAKE THE ALLEGATIONS NECESSARY TO PROSECUTE UCL CLAIMS IN THEIR OWN INTERESTS.

The Court will permit named plaintiffs to amend their complaints to allege that they have "suffered injury in fact" and have "lost money or property" as a result of the alleged unfair competition.

The Court will provide the named plaintiffs the opportunity to seek permission to amend their complaints to add new legal theories of recovery that are based on the same facts and circumstances as the existing UCL claims, to add new plaintiffs if the current plaintiff cannot meet the new standing requirements, and to otherwise amend their complaints. The parties may stipulate to the filing of amended complaints without resolving the validity of the proposed amendments. *Atkinson v. Elk Corp.* (2003) 109 Cal. App. 4th 739, 760 ("we believe that the better course of action would have been to allow Atkinson to amend the complaint and then let the parties test its legal sufficiency in other appropriate proceedings.") The Court does not decide in this order whether any motions to amend will be granted or, if granted, might be later narrowed by motions to strike or otherwise.

CLASS ACTION ISSUES

The amendment to section 17203 is effective immediately because it is a clarifying amendment and does not change any existing rights or obligations. *Southbay Creditors Trust v. General Motors Acceptance Corp.* (1999) 69 Cal. App. 4th 1068, 1080. See also *Edward Fineman Co. v. Superior Court* (1998) 66 Cal. App. 4th 1110, 1124. The amendment has three components: "Any person may pursue representative claims or relief on behalf of others only if the claimant (1) meets the standing requirements of Section 17204 and (2) complies with Section 382 of the Code of Civil Procedure, (3) but these limitations do not apply to claims brought under this chapter by [a public official]."

The requirement that plaintiffs meet the standing requirements of Section 17204 is surplussage. Under Section 17204, any person who is not a public official must meet the requirements of Section 17204.

The requirement that plaintiffs comply with Section 382 of the Code of Civil Procedure before they can "pursue representative claims or relief on behalf of others" is declarative of existing law. As a general rule, persons cannot pursue claims or relief on behalf of absent persons except as provided by a specific statute. C.C.P. 367 ("Except as provided by law, every action must be prosecuted by the party in interest.") Class actions are permitted under C.C.P. 382 and in *Corbett v. Superior Court* (2002) 101 Cal. App. 4th 649, the court held that individual UCL claims could be aggregated through the class action mechanism.

The statement that public prosecutors can represent the general public without class certification is declarative of existing law. *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal. App. 4th 508, 530-533 (UCL claim by Attorney General resulted awards of restitution to injured members of the public). See also *General Tel. Co. v. E.E.O.C.* (1980) 446 U.S. 318, 327-331 (EEOC claims in the interest of the public do not require class certification).

OTHER ASPECTS OF PROPOSITION 64.

The parties did not discuss and the Court would not address how the amendments to Business and Professions Code Sections 17206 and 17536 made by Proposition 64 Sections 4 and 6 affect currently pending cases.

APPLICATION TO THESE CASES.

CASE #1 - *Hoffman v. American Express*, 2001-022881. The First Amended Complaint filed August 7, 2003, states four causes of action, including two under the UCL on behalf of the general public. The motion for judgment on the pleadings on the UCL claims by the named plaintiffs in the interest of the public is GRANTED. Plaintiffs must provide the Attorney

General and the Alameda County District Attorney with notice of this litigation on or before February 25, 2005. If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed.

The motion for judgment on the pleadings on the UCL claims by the named plaintiffs in their own interests is GRANTED WITH LEAVE TO AMEND. C.C.P. 438(h)(1). Plaintiff Hoffman states that he has not been injured. (1AC para 1.) Plaintiff Carr suggests that he has been injured, but refers to no facts. (1AC para 2.) Plaintiffs must allege standing under section 17204. On or before March 4, 2005, Plaintiffs must file either a stipulation to permit the filing of a Second Amended Complaint or a motion for leave to file a Second Amended Complaint. If no stipulation or motion is filed by March 4, 2005, then the claims of plaintiffs on their own behalf will be dismissed.

CASE #2 - *Turner v. Allstate*, 2002-046665. The Third Amended Complaint states two causes of action under the UCL on behalf of the general public. (On September 13, 2004, Plaintiff was granted leave to file the Third Amended Complaint, but the complaint was never actually filed.) The motion for judgment on the pleadings on the UCL claims by the named plaintiff in the interest of the public is GRANTED. Plaintiff must provide the Attorney General and the Alameda County District Attorney with notice of this litigation on or before February 25, 2005. If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed.

There are no claims by Plaintiff Turner in his own interest or in the interest of absent class members. On or before March 4, 2005, Plaintiff must file either a stipulation to permit the

filing of a Fourth Amended Complaint or a motion for leave to file a Fourth Amended Complaint. If no stipulation or motion is filed by March 4, 2005, then the claims of Mr. Turner will be dismissed.

CASE #3 - *Ryan Hanan v. Ford*, HG03-086629. The First Amended Complaint filed December 10, 2003, states two causes of action under the UCL on behalf general public. The motion for judgment on the pleadings on the UCL claims by the named plaintiff in the interest of the public is GRANTED. Plaintiff must provide the Attorney General and the Alameda County District Attorney with notice of this litigation on or before February 25, 2005. If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed.

The motion for judgment on the pleadings on the UCL claims by the named plaintiff in his own interest is GRANTED WITH LEAVE TO AMEND. C.C.P. 438(h)(1). Plaintiff Hanan alleges that he owns a Crown Victoria. Plaintiff must allege standing under section 17204. On or before March 4, 2005, Plaintiff must file either a stipulation to permit the filing of a Second Amended Complaint or a motion for leave to file a Second Amended Complaint. If no stipulation or motion is filed by March 4, 2005, then the claims of plaintiff on his own behalf will be dismissed. Plaintiff is encouraged to consider the "economic loss rule" when drafting any Second Amended Complaint. See *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal. 4th 979.

CASE #4 - *Cellphone Termination Fee Cases*, JCCP 004332. This coordinated proceeding includes several complaints that are organized by defendant and the nature of the claims. The motions for judgment on the pleadings on the UCL claims by the named plaintiffs in the interest of the public are GRANTED. Plaintiffs must provide the Attorney General and the

Alameda County District Attorney with notice of this litigation on or before February 25, 2005. If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed.

The motions for judgment on the pleadings on the UCL claims by the named plaintiffs in their own interests are GRANTED WITH LEAVE TO AMEND. C.C.P. 438(h)(1). Plaintiffs must allege facts that demonstrate standing under section 17204. On or before March 4, 2005, Plaintiffs must file either a stipulation to permit the filing of Amended Complaints or motions for leave to file Amended Complaints. If no stipulation or motions are filed by March 4, 2005, then the claims of plaintiffs on their own behalf will be dismissed. Plaintiffs are encouraged to consider the "economic loss rule" when drafting any Amended Complaints. See *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal. 4th 979.

CASE #5 - *Cross Country Bank Cases*, JCCP 004380. The Fifth Amended Complaint filed December 1, 2004, states five causes of action, including the fifth cause of action under the UCL on behalf the plaintiffs, a putative class, and the general public. The motion for judgment on the pleadings on the UCL claim in the interest of the public is GRANTED. Plaintiffs must provide the Attorney General and the Alameda County District Attorney with notice of this litigation on or before February 25, 2005. If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed.

The motion for judgment on the pleadings on the UCL claims by named plaintiffs Dana Klussman and Samantha Klussman in their own interests is DENIED. Plaintiffs Dana Klussman and Samantha Klussman adequately allege that they have suffered actual injury and have lost

money or property as a result of the alleged unfair competition. (5AC para 7-8.) The Court will permit, but does not require, the filing of a Sixth Amended Complaint to restate the claims asserted without the general public allegations and to incorporate the claims of Clark Lattrell. Any such Sixth Amended Complaint must be filed on or before March 4, 2005.

CASE #6 - *Turner v. State Farm*, RG03-078358. The Second Amended Complaint filed August 22, 2003, states two causes of action under the UCL on behalf general public. The motion for judgment on the pleadings on the UCL claims by the named plaintiff in the interest of the public is GRANTED. Plaintiff must provide the Attorney General and the Alameda County District Attorney with notice of this litigation on or before February 25, 2005. If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed.

There are no claims by Plaintiff Turner in his own interest or in the interest of absent class members. On or before March 4, 2005, Plaintiff must file either a stipulation to permit the filing of a Third Amended Complaint or a motion for leave to file a Third Amended Complaint. If no stipulation or motion is filed by March 4, 2005, then the claims of Mr. Turner will be dismissed.

CASE #7 - *Turner v. Farmers Ins. Co.*, RG03-078362. The Second Amended Complaint filed August 22, 2003, states two causes of action under the UCL on behalf general public. The motion for judgment on the pleadings on the UCL claims by the named plaintiff in the interest of the public is GRANTED. Plaintiff must provide the Attorney General and the Alameda County District Attorney with notice of this litigation on or before February 25, 2005. If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed.

There are no claims by Plaintiff Turner in his own interest or in the interest of absent class members. On or before March 4, 2005, Plaintiff must file either a stipulation to permit the filing of a Third Amended Complaint or a motion for leave to file a Third Amended Complaint. If no stipulation or motion is filed by March 4, 2005, then the claims of Mr. Turner will be dismissed.

CASE #8 - *Goldman v. Furniture Traditions*, RG03-083217. The First Amended Complaint filed June 16, 2003, states two causes of action under the UCL on behalf general public. The motion for judgment on the pleadings on the UCL claims by the named plaintiff in the interest of the public is GRANTED. Plaintiffs must provide the Attorney General and the Alameda County District Attorney with notice of this litigation on or before February 25, 2005. If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed.

There are no claims by Plaintiff Goldman in his own interest or in the interest of absent class members. (1AC para 1.) On or before March 4, 2005, Plaintiff must file either a stipulation to permit the filing of a Fourth Amended Complaint or a motion for leave to file a Fourth Amended Complaint. If no stipulation or motion is filed by March 4, 2005, then the claims of Mr. Goldman will be dismissed.

CASES #9, 10, and 11 - *FATE v. Covenant Care*, RG03-087211, *FATE v. Ember Care*, RG03-087224, and *FATE v. GranCare*, RG03-103363. The complaints in these cases each state four causes of action, including three causes of action under the UCL on behalf general public. The motions for judgment on the pleadings on the UCL claims by the named plaintiff in the interest of the public are GRANTED. Plaintiffs must provide the Attorney General and the

Alameda County District Attorney with notice of this litigation on or before February 25, 2005. If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed.

FATE has alleged claims on behalf of the general public under Health and Safety section 1430(a). These claims in the interest of the public were not the subject of Proposition 64 and were not affected by it. There are no claims by Plaintiff FATE in his own interest or in the interest of absent class members. The Court will permit, but does not require, FATE to file Amended Complaints that restate its claims under Health and Safety 1430(a). If FATE seeks to add new claims or new parties, it must file either stipulations to permit the filing of Amended Complaints or motions for leave to file Amended Complaints.

CASE #12 - *The Utility Consumers Action Network v. Pacific Bell*, RG04-174050. The Complaint filed September 8, 2004, states three causes of action, including two under the UCL on behalf of the itself, its members, and the general public. The motion for judgment on the pleadings on the UCL claims by the named plaintiff in the interest of the public is GRANTED. Plaintiffs must provide the Attorney General and the Alameda County District Attorney with notice of this litigation on or before February 25, 2005. If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed.

The motion for judgment on the pleadings on the UCL claims by the named plaintiff in its own interest and on behalf if its members based on the claim preclusion (res judicata) effect of the PUC proceeding is DENIED. The PUC proceeding was an administrative proceeding, not a civil lawsuit. *People v. Damon* (1996) 51 Cal. App. 4th 958, 969, states, "Res judicata

principles sometimes apply to administrative decisions, but not always." *Damon* explained that "administrative decisions should not be given res judicata effect if the statutory scheme explicitly or implicitly shows a contrary intent." *Id.* at 970. The Court finds that the PUC proceeding was not intended to preclude civil claims by ratepayers. The PUC order of September 20, 2001, states, "Our disposition of the instant complaint rests on Public Utility Code issues, and we do not adjudicate the Unfair Competition Law claims." (9/20/01 Order at 9.) See also 2/7/02 Order at 35-36. In addition, the Court notes that although the PUC proceeding resulted in policy changes at Pacific Bell and the imposition of penalties, it did not result in the payment of compensation to ratepayers. See *Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal.App.4th 454 (Public injunctive relief not res judicata on private claims for monetary relief).

The motion for judgment on the pleadings on the UCL claims by the named plaintiffs in their own interests is GRANTED WITH LEAVE TO AMEND. C.C.P. 438(h)(1). Plaintiffs must allege facts that demonstrate standing under section 17204.

The motion for judgment on the pleadings on the UCL claims by the named plaintiff on behalf if its members is GRANTED WITH LEAVE TO AMEND. Plaintiffs must identify its members and allege facts suggesting that it can pursue a claim on behalf of its members (associational standing). *Associated Builders & Contractors v. San Francisco Airports Com* (1999) 21 Cal. 4th 352, 361. The Court does not resolve in this order whether section 17203 as amended precludes UCL claims by associations on behalf of their members. On or before March 4, 2005, Plaintiffs must file either a stipulation to permit the filing of a First Amended Complaint or a motion for leave to file a First Amended Complaint. If no stipulation or motion is filed by

March 4, 2005, then the claims of plaintiff on it own behalf and on behalf of its members will be dismissed.

CASE #13 - *Center For Biological Diversity, Inc. v. FPL*, RG04-183113. The Complaint filed November 1, 2004, states nine causes of action, all under the UCL and all on behalf of the Center for Biological Diversity and Peter Galvin on behalf themselves, the members of the Center, and the general public. The motion for judgment on the pleadings on the UCL claims by the named plaintiff in the interest of the public is GRANTED. Plaintiffs must provide the Attorney General and the Alameda County District Attorney with notice of this litigation on or before February 25, 2005. If no public official has intervened in the case to prosecute the UCL claims in the interest of the general public by May 6, 2005, then the claims in the interest of the general public will be dismissed.

The motion for judgment on the pleadings on the UCL claims by the named plaintiffs in their own interests is DENIED. This case concerns the care of California wildlife, California wildlife is part of the public trust, and the state holds the wildlife for the benefit of the people. Fish and Game Code 711.7(a), 1600, 1802, *Betchart v. Department of Fish & Game* (1984) 158 Cal. App. 3d 1104, 1106. Plaintiffs have sufficiently alleged an actual injury to property held in trust for themselves to satisfy the standing requirements of section 17204 at the pleading stage. *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 431 fn 11 ("any member of the general public has standing to raise a claim of harm to the public trust"). The named plaintiffs allege standing to pursue claims to protect the public trust without bringing those claims in the interest of "the general public." This order does also not preclude Defendants from raising the standing issue on a motion for summary judgment or otherwise.

The Court does not reach the issue of whether the Center for Biological Diversity can pursue UCL claims in the interest of its members under the theory of "associational standing." *Associated Builders & Contractors, supra.*

The Court states no opinion whether any dismissal or abandonment of UCL claims as a result of this order constitutes a judgment on the merits and might have any claim or issue preclusion (res judicata/collateral estoppel) effect in later cases.

Dated: February __, 2005

Judge Ronald M. Sabraw