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2
3 SUPERIOR COURT OF THE STATE OF CALIFORNIA
4 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
The Utility Consumers Action Network v. Pacific Bell	RG04-174050
Center For Biological Diversity, Inc. v. FPL	RG04-183113

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[TENTATIVE] ORDER (1)
GRANTING MOTION 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 MOTION TO STRIKE
UCL CLAIMS ASSERTED BY
PRIVATE PARTIES IN THEIR OWN
INTERESTS; AND (4) PERMITTING
PRIVATE PARTIES LEAVE TO
AMEND TO ALLEGE STANDING TO
PROSECUTE INDIVIDUAL AND
CLASS CLAIMS.

Date: February 10, 2004
Time: 9:00 am
Dept.: 22

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19 NOTE TO TENTATIVE DECISION.

20 All of the motions in the above cases concern the effect of Proposition 64 on pending
21 cases. The Court is inclined to frame the issues in ways that were not addressed directly by the
22 parties in their briefs. Therefore, the court issues this tentative decision on January 28, 2005,
23 and permits Plaintiffs and Defendants to submit supplemental briefs. This will allow all
24 potentially affected persons to address the tentative basis for the Court's decision. See *Bacon v.*
25 *Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 860 ("The trial court may grant [a motion]
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1 on a ground not specifically tendered by the moving party, so long as the opposing party has
2 notice of and an opportunity to respond to that ground.”).

3 Because these cases and the Court’s tentative order implicate the interests of the People
4 of the Sate of California and/or the “general public,” the Court is giving notice of the hearing and
5 this tentative order to the Attorney General and the Alameda County District Attorney.

6 Plaintiffs, Defendants, the Attorney General, and the Alameda County District Attorney
7 may submit briefs of up to 15 pages each on or before February 7, 2005. This supercedes the
8 statutory briefing schedule and any previously stipulated or ordered briefing schedules.
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11 **SUMMARY.**

12 Proposition 64 did not affect the legal standards for permissible conduct under the UCL.
13 Any act that was unlawful, unfair, or fraudulent under the UCL before November 3, 2004,
14 remains unlawful, unfair, or fraudulent.

15 Proposition 64 did change who can prosecute claims under the UCL. How Proposition
16 64 affects any given case depends on the identity of the named plaintiff and the identity of the
17 real party in interest.
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19 UCL claims prosecuted by the Attorney General or any other public entity in the interest
20 of the People of the State of California are not affected by the amendments to sections 17203 and
21 17204.

22 UCL claims currently prosecuted by private parties in the interest of the general public
23 are affected by the change to section 17204. Private parties can no longer prosecute UCL claims
24 in the interest of the general public. To ensure that the general public can continue to prosecute
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1 legitimate claims, the Court will permit the Attorney General or any other public entity to
2 intervene and continue the prosecution of UCL claims in the interest of the general public.

3 UCL claims prosecuted by private parties in their own interest are affected by the change
4 to section 17204. Private persons asserting private UCL claims can continue to prosecute those
5 claims only if they have suffered injury in fact and have lost monetary or property as a result of
6 the unfair competition. The Court will grant plaintiffs leave to amend to add allegations of
7 injury in fact and loss of money or property.
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9 The change to section 17203 codifies the existing law that private parties prosecuting
10 UCL claims in their own interest may also represent a class of similarly situated persons under
11 C.C.P. 382. The Court will permit Plaintiffs who have previously alleged claims in the interest
12 of the public leave to amend to add class action allegations.

13 The overall result is that UCL claims in the interest of the general public must now be
14 prosecuted by government entities and claims by private persons that were in the interest of the
15 general public may be restated as class claims and prosecuted as private claims.
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18 **PROPOSITION 64.**

19 Proposition 64 was approved by the general public in an election on November 2, 2004,
20 and became effective the next day. Cal. Const. Art. II, § 10 (a) (“An initiative statute or
21 referendum approved by a majority of votes thereon takes effect the day after the election unless
22 the measure provides otherwise.”) At issue in these motions is how to apply the statutory
23 amendments made in Proposition 64 to pending cases that were filed on or before November 2,
24 2004.
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1 Proposition 64 contains nine separate sections: section 1 is the “Findings and Declaration
2 of Purpose, sections 2-6 are statutory amendments; and sections 7-9 concern the application of
3 the statutory amendments. The statutory amendments concern Business and Professions Code
4 sections 17203, 17204, 17206, 17535, and 17536. The amendments to a single section can in
5 turn concern more than one issue. Specifically, the amendment to section 17204 both eliminates
6 the right of a private person to represent the general public and requires a person bringing a UCL
7 claim in his or her own interest to meet heightened standing requirements. The multiple
8 amendments in Proposition 64 require the Court to consider each amendment separately.
9

10 It is also worth noting that the UCL is a complex statute with both procedural and
11 substantive provisions. Procedurally, the UCL previously had provisions that authorized claims
12 by government entities, private persons in the interest of the general public, and private persons
13 in their own interests. Substantively, the UCL permits claims for unlawful, unfair, and
14 fraudulent business practices. Paraphrasing *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th
15 744, 756-757 and 757-758, although the UCL has been treated as an omnibus consumer
16 protection statute, the Court is careful not to assume that all UCL claims are procedurally and
17 substantively similar. Such an assumption would “fail[] to attend to the complexity of the [UCL]
18 and the variety of claims that may be adjudicated under its rubric.”
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21 **SUBSTANTIVE LAW.**

22 Proposition 64 did not affect change the UCL’s standards for permissible conduct. Under
23 Business and Professions Code 17203, “Any person who engages, has engaged, or proposes to
24 engage in unfair competition may be enjoined in any court of competent jurisdiction.” Business
25 and Professions Code 17200 defines unfair competition as “any unlawful, unfair, or fraudulent
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1 business act.” Proposition 64 did not change these provisions. Any act that was unlawful,
2 unfair, or fraudulent under the UCL before November 3, 2004, remains unlawful, unfair, or
3 fraudulent.

4 5 PROSECUTION OF UCL CLAIMS BEFORE PROPOSITION 64.

6 Before Proposition 64, three different types of plaintiffs could prosecute UCL claims: (1)
7 the Attorney General or any other public entity in the interest of the People of the State of
8 California; (2) private parties in the interest of the general public; and (3) private parties in their
9 own interest.
10

11 These three categories of cases were expressly identified in Business and Professions
12 Code 17204, which stated, “Actions for any relief pursuant to this chapter shall be prosecuted
13 exclusively in a court of competent jurisdiction by [1] the Attorney General or any district
14 attorney ... in the name of the people of the State of California upon their own complaint or
15 upon the complaint of any board, officer, person, corporation or association or by any person
16 acting for the interests of [2] itself, its members or [3] the general public.”
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19 TEXT OF PROPOSITION 64.

20 As it reads after the adoption of Proposition 64, section 17204 states, “Actions for any
21 relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction
22 [1] by the Attorney General or any district attorney ... in the name of the people of the State of
23 California upon their own complaint or upon the complaint of any board, officer, person,
24 corporation or association or [2] by any person who has suffered injury in fact and has lost
25 money or property as a result of such unfair competition.”
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1 As directed by *People v. Canty* (2004), 32 Cal. 4th 1266, 1276-1277, the Court interprets
2 a voter initiative using the same principles that govern the construction of a statute. The Court’s
3 role is to ascertain the electorate’s intent so as to effectuate the purpose of the law. The Court
4 first examines the language of the proposition and gives the words their usual, ordinary meaning.
5 If the language is clear and unambiguous, the Court follows the plain meaning of the measure.
6 This “plain meaning” rule does not, however, prohibit a court from examining whether the literal
7 meaning of a measure comports with its purpose. The language is construed in the context of the
8 measure as a whole. The intent of the law prevails over the letter of the law.
9

10 Starting with the letter of the UCL as amended, the Court focuses on the word
11 “prosecuted” in section 17204. California courts have held consistently that “prosecution”
12 includes every aspect of a case through final judgment. See *Ramos v. Superior Court* (1982) 32
13 Cal. 3d 26, 36 (“The term “prosecution” is sufficiently comprehensive to include every step in
14 an action from its commencement to its final determination.”); *Melancon v. Superior Court of*
15 *Los Angeles County* (1954) 42 Cal. 2d 698, 707-708 (“Petitioner further urges that he is entitled
16 to proceed with the depositions he seeks, in the course of preparing for the eventual trial of the
17 derivative action, even though he has not as yet complied with the order for the posting of
18 security. It seems clear, however, that the taking of depositions for such purpose would
19 constitute a step in the “prosecution” of the action and therefore falls within the stay provisions
20 of section 834.”).

21
22 This definition of “prosecution” is implicit in Code of Civil Procedure 583.110 et seq
23 (especially 583.420) and California Rule of Court 373 (especially subsection (e)), regarding the
24 dismissal of cases for delay in prosecution. The Code of Civil Procedure and Rules of Court are
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1 not concerned with delay in filing a case (which is covered by the statute of limitations), but the
2 delay in bringing the case to trial after it has been filed.

3 Where it is instructive, the Court has also considered the “Findings and Declaration of
4 Purpose” in Proposition 64, Section 1, and the voter information guide. *People v. Canty* (2004)
5 32 Cal. 4th 1266, 1280 (“statements of the intent of the enacting body contained in a preamble,
6 while not conclusive, are entitled to consideration”); *Hayward Area Planning Assn. v. Alameda*
7 *County Transportation* (1999) 72 Cal. App. 4th 95, 104-105 (“[I]f the meaning of the words is
8 not clear courts can use interpretative aids; with respect to voter-approved enactments, these aids
9 include the ballot analysis, the official summary, and the arguments presented to the voters.”).

10
11 The Court gives immediate effect the amendment to section 17204 because it concerns
12 which persons or entities can “prosecute” pending cases.

13
14 CLAIMS BY PUBLIC PROSECUTORS IN THE INTEREST OF THE PEOPLE OF THE
15 STATE OF CALIFORNIA.

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17 When government entities pursue UCL claims in the name of the people of the State of
18 California, the UCL claims are in the nature of law enforcement actions. *People v. Pacific Land*
19 *Research Co.* (1977) 20 Cal.3d 10, 17 (UCL claim by the Attorney General “is fundamentally a
20 law enforcement action designed to protect the public and not to benefit private parties.”). The
21 government entities act as representatives of the people as an indivisible whole. *People v.*
22 *Eubanks* (1996) 14 Cal.4th 580, 589-590, states, “The prosecutor speaks not solely for the victim,
23 or the police, or those who support them, but for all the People. That body of 'The People'
24 includes the defendant and his family and those who care about him. It also includes the vast
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1 majority of citizens who know nothing about a particular case, but who give over to the
2 prosecutor the authority to seek a just result in their name.”

3 Proposition 64 has not changed the ability of the Attorney General, any district attorney,
4 or any authorized government entity to “prosecute” a UCL claim in the name of the people of the
5 State of California. This is clear from Section 1(g) of Proposition 64, which states “It is the
6 intent of California voters in enacting this act that Attorney General, district attorneys, county
7 counsels, and city attorneys maintain their protection authority and capability under the unfair
8 competition laws.”
9

10 11 CLAIMS BY PRIVATE PERSONS IN THE INTEREST OF THE GENERAL PUBLIC.

12 Proposition 64 has eliminated the ability of private persons to prosecute UCL claims in
13 the interest of the “general public.” The Court examines (1) who was the real party in interest
14 when a claim was asserted “in the interest of” the general public; (2) what is “the general
15 public”; (3) who represents “the general public”; and (4) can “the general public” choose how it
16 is represented in legal proceedings.
17

18 19 WHO WAS THE REAL PARTY IN INTEREST WHEN A PRIVATE PARTY ASSERTED A 20 UCL CLAIM IN THE INTEREST OF THE GENERAL PUBLIC?

21 The Court holds that when private parties asserted UCL claims in the interest of the
22 general public the real party in interest was the general public.

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

3 In the first case to apply this language, *Hernandez v. Atlantic Finance Co.* (1980) 105
4 Cal. App. 3d 65, stated, “[W]e read the statute as expressly authorizing the institution of action
5 by any person on behalf of the general public. The Legislature has provided that suit may be
6 brought by any person acting in his own behalf *or* on behalf of the general public.” The Court
7 then distinguished actions on behalf of the general public prosecuted by a private attorney
8 general with a class action where the named plaintiff has suffered damages, is pursuing his or her
9 own claim, and seeks to represent similarly situated persons. This suggests that the court
10 considered the claims in the interest of the public as distinct from the claims in the interest of the
11 named plaintiff. See also *Prata v. Superior Court* (2001) 91 Cal. App. 4th 1128, 1138-1139
12 (holding that claim in interest of general public is distinct from claim in interest of named
13 plaintiff).
14

15 A claim by a private person in the interest of the general public is similar to a claim by a
16 government official in the interest of a state department or agency – the former may be the
17 named party but the latter is the real party in interest. Federal Rule of Civil Procedure 25(d)(1),
18 regarding substitution of parties, acknowledges this and states, “when a public officer is a party
19 to an action in an official capacity and during its pendency ... ceases to hold office, then the
20 action does not abate and the officer's successor is automatically substituted as a party.”
21

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

4 The Court concludes that although private parties asserting UCL claims in the interest of
5 the general public may devote time and energy to the claims, the real party in interest is the
6 general public.

7
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9 WHAT IS THE “GENERAL PUBLIC”?

10 The Court holds that when a private plaintiff brought a UCL claim in the interest of the
11 general public under former Business and Professions Code 17204, the plaintiff represented the
12 public as a whole. The Court could not locate any law directly on this subject, but the “general
13 public” presumably has the same meaning as the “People of the State of California” under
14 Government Code 100(a).¹

15 The judicial treatment of claims in the interest of the general public suggests that they are
16 in the interest of the public as a whole and not in the interest of the named plaintiff, persons
17 similarly situated to the named plaintiff, or persons injured by the result of the unfair
18 competition. For example, a judgment on a UCL claim in favor of the general public is not
19 binding on the individual members of the public. *Corbett v. Superior Court* (2002) 101 Cal.
20 App. 4th 649, 662 (majority) and 684 (dissent); *Payne v. National Collection Systems, Inc.*
21 (2001) 91 Cal. App. 4th 1037. In addition, if a private person obtains relief for the general
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26 ¹ *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 public. 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. As a general matter, corporations are members of the general public and are

1 public, the plaintiff usually seeks to recover fees under C.C.P. 1021.5 for benefits conferred on
2 the general public.

3 The Court notes that there is some case law suggesting that UCL claims by private
4 persons in the interest of the public are not as “public” as claims by public prosecutors on behalf
5 of the People of the State of California. *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal. 4th
6 1132, 1154 n12, *Net2phone, Inc. v. Superior Court* (2003) 109 Cal. App. 4th 583, 587, and
7 *Payne v. National Collection Systems, Inc.* (2001) 91 Cal. App. 4th 1037, 1044-1047. Although
8 these cases implicitly suggest that the “People of the State of California” has a different meaning
9 than the “general public,” they do not explain why there is a difference or what that difference
10 might be. In the absence of clear direction, the Court concludes that the “general public” has the
11 same meaning as the “People of the State of California.”
12

13 14 WHO REPRESENTS “THE GENERAL PUBLIC”?

15 Before Proposition 64, section 17204 permitted private persons to prosecute actions on
16 behalf of the general public.²
17

18 Former section 17204 was a departure from the ordinary course of things, where the
19 Executive branch enforces laws in the interest of the public. Cal. Const., art. V, § 13 (“It shall be
20 the duty of the Attorney General to see that the laws of the State are uniformly and adequately
21 enforced.”); Government Code § 26500 (“The district attorney is the public prosecutor, except as
22 otherwise provided by law. The public prosecutor shall attend the courts, and within his or her
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25 entitled to the protection of California law. *People v. Eubanks* (1996) 14 Cal. 4th 580 (criminal prosecution for
theft of trade secrets from large corporation).

26 ² 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).

1 discretion shall initiate and conduct on behalf of the people all prosecutions for public
2 offenses.”) See also *People v. Oakland Water Front Co.* (1879) 118 Cal. 234, 239 (the attorney
3 general has the authority and power to institute or prosecute proceedings in the name or on
4 behalf of “the people of the state”); *People v. Cortes* (1990) 71 Cal. App. 4th 62 , 79 (“our state
5 Constitution delegates the prosecutorial function to the executive branch, which is represented
6 by the district attorney.”)
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9 **THE GENERAL PUBLIC CAN CHOOSE WHO CAN REPRESENT IT IN THE COURTS.**

10 The amendment to section 17204 in Proposition 64 eliminates the ability of private
11 persons to prosecute actions on behalf of the general public and transfers that authority to public
12 officials. This is apparent from the text of the amendment to section 17204. This is also
13 supported by the “Findings and Declaration of Purpose” in Proposition 64, Section 1, and the
14 ballot statement.

15 In the “Findings and Declaration of Purpose” in Proposition 64, Section 1, the people of
16 the State of California found and declared that some private attorneys were filing “lawsuits on
17 behalf of the general public without any accountability to the public and without adequate court
18 supervision.” Section 1(b)(4). The section then states, “It is the intent of California voters in
19 enacting this act that only the California Attorney General and local public officials be
20 authorized to file and prosecute actions on behalf of the general public.” Section 1(f). This is a
21 strong suggestion that the people wanted to transfer the authority for prosecuting claims in the
22 interest of the public from unaccountable and unsupervised private attorneys to government
23 officials.
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1 The arguments in the voter information guide echo this purpose. The “ARGUMENT in
2 Favor of Proposition 64” states: “Shakedown lawyers ‘appoint’ themselves to act like the
3 Attorney General and file lawsuits on behalf of the people of the State of California, demanding
4 thousands of dollars from small businesses that can’t afford to fight in court.”.... Here’s why
5 ‘YES’ on Proposition 64 makes sense: ... * Allows only the Attorney General, district
6 attorneys, and other public officials to file lawsuits on behalf of the People of the State of
7 California to enforce California’s unfair competition law.” The REBUTTAL to Argument
8 Against Proposition 64 states: “Here’s what 64 really does: ... * Stops fee-seeking lawyers
9 from exploiting a loophole in California law - A LOOPHOLE NO OTHER STATE HAS – that
10 lets them ‘appoint’ themselves to act like the Attorney General and file lawsuits on behalf of the
11 people of the State of California.”.... * Permits only real public officials like the Attorney
12 General or District Attorneys to file lawsuits on behalf of the People of the State of California.”

13
14 As directed by *Canty*, 32 Cal. 4th at 1276-1277, the Court’s role is to ascertain the
15 electorate’s intent so as to effectuate the purpose of the law. The intent of the electorate is clear
16 in the amendment to 17204, in the “Findings and Declaration of Purpose,” and in the ballot
17 arguments – the electorate wants claims in the interest of the general public to be prosecuted
18 only by “real public officials.”

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

23 The amendment to section 17204 by Proposition 64 did not eliminate claims in the
24 interest of the general public or direct that they be dismissed - it changed the law so that only the
25 Attorney General and local public officials can prosecute actions on behalf of the general public.
26

1 There is no suggestion in Proposition 64 that all pending claims in the interest of the
2 general public should be dismissed. Proposition 64 reaffirms that the state’s unfair competition
3 laws are intended to protect California businesses and consumers from unlawful unfair and
4 fraudulent business practices. Section 1(a). Proposition 64 also states that “some private
5 attorneys” are misusing the UCL. Section 1(b). The word “some” is important because it
6 suggests that other private attorneys have filed and are pursuing legitimate UCL claims in the
7 interest of the general public.
8

9 To ensure that legitimate claims are pursued on behalf of the general public, the Court
10 will permit the California Attorney General and local public officials to continue the prosecution
11 of actions on behalf of the general public. This will provide the accountability that was lacking
12 previously, section 1(b)(4), and permit government entities to assume the public protection
13 authority and capability intended by the voters, section 1(g). The government entities may elect
14 to continue the prosecution of all, some, or none of the affected cases. *Consumers Union of U.S.,*
15 *Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal. App. 4th 963, 976 (in enforcing the UCL,
16 “prosecutors have broad discretion to choose which defendants to prosecute”).
17

18 On or before February 18, 2005, any private person that that has asserted a claim in the
19 interest of the public must serve on the Attorney General and the Alameda County District
20 Attorney a notice stating the nature of any claim in the interest of the general public and the
21 status of the litigation. On or before February 25, 2005, any private person that that has asserted
22 a claim in the interest of the public must file with the Court a declaration stating that the
23 government entities have been served with the notice. The actual notice is in the nature of a
24 communication regarding the substitution of counsel and the transfer of a file and need not be
25 filed. On or before April 1, 2005, The Attorney General and/or the Alameda County District
26

1 Attorney may intervene in any case to pursue any claims in the interest of the general public. If
2 a government entity has not appeared to represent the interests of the general public by April 1,
3 2005, then the claims in the interest of the general public will be dismissed as of the close of
4 business on April 1, 2005.

5
6 **OTHER ISSUES CONCERNING CLAIMS IN THE INTEREST OF THE GENERAL PUBLIC.**
7

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

10 Various plaintiffs argue that Proposition 64's amendment to section 17204 could not be
11 retroactive absent express language to the contrary. These arguments rely on authority holding
12 that a new statute is generally inapplicable to pending actions if it is determined to affect "rights,
13 obligations, acts, transactions and conditions which are performed or exist prior to the adoption
14 of the statute." *Aetna Cas. & Surety Co. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 391. Where
15 private claims are at issue, there is a presumption that those claims are not forfeited when a
16 statute is amended. *Evangelatos v. The Superior Court of Los Angeles County* (1988) 44 Cal.3d
17 1188, 1209.
18

19 These arguments are met with three points: (1) the claims of private plaintiffs in the
20 interest of the general public are in the interest of the general public; (2) the general public,
21 acting through public prosecutors, can still prosecute those claims; (3) if Proposition 64 did
22 prohibit the prosecution of claims by the general public, the statute should be construed to apply
23 retroactively.
24

25 First, UCL claims in the interest of the general public were in the interest of the public as
26 a whole. The named plaintiff was only a representative of the public and had no personal

1 interest in the outcome of the litigation. Although named plaintiffs may have “acted in reliance
2 on the then-existing state of the law” when they undertook to represent the public, they have not
3 been subjected to “unexpected and potentially unfair consequences” because they cannot pursue
4 claims on behalf of the public. *Evangelatos*, 44 Cal.3d at 1217. A named plaintiff has not been
5 deprived of any personal claim or cause of action because he or she cannot pursue a claim in the
6 interest of the general public.

7
8 Second, public prosecutors can still prosecute UCL claims in the interest of the general
9 public. Proposition 64 does not affect the right of the public to pursue pending UCL claims, it
10 just vests the authority for further prosecution in government entities.

11 Third, if Proposition 64 did prohibit the prosecution of claims by the general public
12 (which it does not), the statute would apply retroactively. The general public, acting through the
13 Legislature or through a ballot initiative, may presumably limit its own ability to assert claims
14 against private persons. If the general public elects to waive a claim that belongs to the general
15 public, it presumably has the power to do so. Therefore, where public claims are at issue, there
16 is a presumption that those claims are forfeited when a statute is amended.

17
18 The claims most frequently asserted on behalf of the People of the State of California are
19 criminal charges under the Penal Code. When there is a change in the penal code that limits
20 liability or mitigates punishment and there is no saving clause, the general rule is that the
21 amendment operates retroactively. When Legislature repeals a criminal statute or otherwise
22 removes the State's condemnation from conduct that was formerly deemed criminal, that action
23 requires the dismissal of pending criminal proceedings charging such conduct. This is because
24 the Courts presume that Legislature is not motivated by a desire for vengeance and would want
25 the Executive branch to pursue charges or punishments that the Legislature had determined to
26

1 not be in the interest of California. *People v. Figueroa* (1993) 20 Cal. App. 4th 65, 69-70;
2 *People v. Nasalga*, (1976) 12 Cal. 4th 784, 792.

3 If, by approving Proposition 64, the people of the state of California decided that they did
4 not want to pursue claims in the interest of the general public under the UCL (which they did
5 not), then defendants should be entitled to the benefits of that change immediately. It seems
6 logical that if amendments to eliminate a criminal offense take immediate effect in all pending
7 criminal cases initiated by the people of the State of California, then amendments to eliminate
8 civil liabilities should also take immediate effect in all pending civil cases initiated in the interest
9 of the general public. This would be consistent with *Governing Board of Rialto Unified School*
10 *Dist. v. Mann* (1977) 18 Cal. 3d 819, 828-831.

12 Various defendants argued that Proposition 64's amendment to section 17204 take
13 immediate effect and require the dismissal of all claims brought by private persons in the interest
14 of the general public. These arguments rely on two major themes: (1) UCL claims assert a
15 statutory right and seek a statutory remedy so a repeal of the statute terminates all pending
16 actions, and (2) the changes in the UCL are procedural in nature and apply immediately.
17 *Physicians Com. for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal. App. 4th 120,
18 125-126. The Court addresses these arguments separately.

20 The Court finds no merit to the defense argument that Proposition 64 repealed the general
21 public's rights. Proposition 64 does not preclude the general public from prosecuting UCL
22 claims or change the substantive law that applies to those claims, it only changes who may
23 represent the general public in those claims. The Court agrees that if the named plaintiffs were
24 asserting statutory rights and seeking statutory remedies in their own names and the statute was
25 repealed, then the claims would have to be dismissed, but that is not the situation here.
26

1 The Court finds merit to the defense argument that Proposition 64’s changes are
2 procedural in nature and apply immediately, but finds that the changes do not require the
3 immediate dismissal of the claims in the interest of the public. In *Brenton v. Metabolife*
4 *Internat., Inc.* (2004) 116 Cal. App. 4th 679, 688-689, the Court states that courts have broadly
5 distinguished between *substantive* and *procedural* statutes and held that “if a statutory change is
6 *substantive* because it would impose new, additional or different liabilities based on past
7 conduct, courts are loath to interpret it as having retrospective application” but that “applying
8 changed procedural statutes to the conduct of existing litigation, ... involves no improper
9 retrospective application because the statute addresses conduct in the future.” The focus is on
10 whether the changes to the UCL “would impose new, additional or different liabilities on
11 [defendants] based on [defendants]’s past conduct, or whether it merely regulates the conduct of
12 ongoing litigation.” *Brenton*, 116 Cal.App.4th at 689.

14 The amendment to section 17204 regarding claims by the general public is procedural in
15 nature because it “merely regulates the conduct of ongoing litigation.” The general public can
16 continue to pursue claims, but the general public now wants to be represented by government
17 entities rather than private persons.

19 The amendment to section 17204 regarding claims by the general public does take effect
20 immediately, but it does not require dismissal of the claims. The Court will permit government
21 entities to continue the prosecution of actions on behalf of the general public.

23 **CLAIMS BY PRIVATE PERSONS IN THEIR OWN INTERESTS.**

24 Proposition 64 amended section 17204 to read, “Actions for any relief pursuant to this
25 chapter shall be prosecuted exclusively in a court of competent jurisdiction ... by any person
26

1 who has suffered injury in fact and has lost money or property as a result of such unfair
2 competition.” This amendment creates a new requirement for UCL claims by private persons.

3
4 PRIVATE PERSONS PROSECUTING UCL CLAIMS IN THEIR OWN INTERESTS MUST
5 NOW MEET THE REQUIREMENTS OF SECTION 17204.

6
7 The analysis related to UCL claims by private persons for their own interests is a
8 relatively straightforward analysis compared to the analysis of UCL claims by private persons in
9 the interest of the public. The issue is whether plaintiffs pursuing a statutory claim must meet
10 standing requirements that were added to the statute after the claim arose and after the action was
11 filed.

12 The general rule is stated in *McClung v. Employment Development Dept.* (2004) 34 Cal.
13 4th 467, 475 as follows, “Generally, statutes operate prospectively only. ... [T]he presumption
14 against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal
15 doctrine centuries older than our Republic. Elementary considerations of fairness dictate that
16 individuals should have an opportunity to know what the law is and to conform their conduct
17 accordingly For that reason, the 'principle that the legal effect of conduct should ordinarily be
18 assessed under the law that existed when the conduct took place has timeless and universal
19 appeal. ... The presumption against statutory retroactivity has consistently been explained by
20 reference to the unfairness of imposing new burdens on persons after the fact.”

21
22 This general rule has three exceptions. First, the Legislature can expressly state that it
23 intends a new law to govern conduct prior to the enactment of the law. *McClung*, 34 Cal.4th at
24 475. There is no express statement in Proposition 64.

1 Second, a procedural change that affects the means of getting to trial but not the elements
2 of the substantive cause of action can be applied immediately even if it affects cases that were
3 filed before the change was adopted. *Tapia v. Superior Court* (1991) 53 Cal. 3d 282, 287-91.

4 This raises the issue whether the new requirements are substantive or procedural. The Court has
5 specifically considered two cases that concern statutory amendments affecting standing
6 requirements. These cases would be particularly useful if they did not go in different directions.

7
8 In *In re Daniel H.* (2002) 99 Cal. App. 4th 804, 809-812, a petitioner mother lacked
9 standing to raise the issue of sibling visitation when the case began and was decided on its
10 merits, but a new statute conferred standing to raise that issue while the case was on appeal. The
11 Court held that the standing amendment was not retroactive and that the mother could not pursue
12 her arguments related to sibling visitation. The Court stated, “However, the new sibling
13 relationship exception was not in effect at the time of the section 366.26 hearing in this case, and
14 it does not appear to be retroactive. ... The mother points to nothing indicating that the
15 Legislature intended the new sibling relationship exception to be retroactive, and we can find
16 nothing. Therefore, the mother still lacks standing to raise the sibling visitation issues in this
17 case.”

18
19 In *Parsons v. Tickner* (1995) 31 Cal. App. 4th 1513 , 1523, the daughter of a decedent
20 initiated claims as the decedent’s successor in interest at a time when those claims could only be
21 brought by the decedent’s personal representative. While the case was pending, the Code of
22 Civil Procedure was changed and conferred standing to successors in interest. The Court held
23 that the standing amendment was retroactive and that the daughter could pursue her claims as the
24 successor in interest. The Court treated the standing requirement as one of procedure and stated,
25 “There is no vested right in existing remedies and rules of procedure and evidence. Generally
26

1 speaking, the Legislature may change such rules and make the changes apply retroactively to
2 causes of action or rights which accrued prior to the change. The repeal of Probate Code section
3 573 and the enactment of Code of Civil Procedure section 377.10 et seq. are procedural only and
4 operate retroactively. Polly Parsons's standing to pursue the claim ... is now governed by Code
5 of Civil Procedure 377.10 et seq.”

6
7 The difference between *Daniel H.* and *Parsons* highlights the statement in *Aetna*
8 *Casualty & Surety Co. v. Industrial Acci. Com.* (1947) 30 Cal. 2d 388, 394-395, that there is no
9 “clear-cut distinction between purely "procedural" and purely "substantive" legislation.” *Aetna*
10 states, “In truth, the distinction relates not so much to the form of the statute as to its effects. If
11 substantial changes are made, even in a statute which might ordinarily be classified as
12 procedural, the operation on existing rights would be retroactive because the legal effects of past
13 events would be changed, and the statute will be construed to operate only in futuro unless the
14 legislative intent to the contrary clearly appears.” See also *Elsner v. Uveges* (2004) 34 Cal. 4th
15 915, 936-937.

16
17 The Court does not resolve whether the amendment requiring individuals to have
18 “suffered injury in fact” and have “lost money or property” is substantive or procedural.

19 Third, plaintiffs pursuing statutory claims are presumed to be acting with the knowledge
20 that the Legislature (or the voters) could repeal or amend the statute at any time. Government
21 Code § 9606 (“Any statute may be repealed at any time, except when vested rights would be
22 impaired. Persons acting under any statute act in contemplation of this power of repeal.”);
23 *Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal. App. 4th 679, 690 (As “a general rule, ... a
24 cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the
25 action thereon is pending, in the absence of a saving clause in the repealing statute.”).

1 The UCL provides rights and remedies that are separate (and in addition to) from those
2 available at common law. Government Code § 9606 and *Brenton* direct that plaintiffs pursuing
3 UCL claims in their own interests did so with the knowledge that the UCL could be repealed or
4 amended at any time and that section 17204's standing requirements take effect immediately.
5 Therefore, the Court holds that plaintiffs in all pending cases must plead and prove that they
6 have suffered injury in fact" and have "lost money or property."

8
9 PLAINTIFFS ARE GRANTED LEAVE TO AMEND TO MAKE THE ALLEGATIONS
10 NECESSARY TO PROSECUTE UCL CLAIMS IN THEIR OWN INTERESTS.

11 The Court will grant plaintiffs leave to file amended complaints alleging that they have
12 "suffered injury in fact" and have "lost money or property" as a result of the alleged unfair
13 competition. If the named plaintiffs cannot meet the new standing requirements, the Court will
14 permit the addition of new plaintiffs who can allege they have "suffered injury in fact" and have
15 "lost money or property." *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal. App. 4th 995,
16 1005 ("[I]f the facts of the cause of action against the defendant would not be "wholly different"
17 after amendment, a complaint filed by a party without standing may be amended to substitute in
18 the real party in interest."); *Tenants Assn. of Park Santa Anita v. Southers* (1990) 222 Cal. App.
19 3d 1293, 1304 ("When a court concludes that the named plaintiffs can no longer suitably
20 represent the class, it should at least afford plaintiffs the opportunity to amend their complaint, to
21 redefine the class, or to add new individual plaintiffs, or both, in order to establish a suitable
22 representative.")

1 OTHER ISSUES CONCERNING CLAIMS IN THE INTEREST OF INDIVIDUAL
2 PLAINTIFFS.

3 Various plaintiffs argue that Proposition 64’s amendment adding the “injury in fact” and
4 “lost money or property” requirements cannot be applied to pending cases because it would
5 deprive the plaintiffs of a vested claim. As discussed above, where the claim is a creation of
6 statute, the claim can be eliminated when the statute is amended or repealed.
7

8 It is worth noting that named plaintiff are not deprived of their common law claims and
9 their ability to pursue those claims substantially limits any prejudice caused by the application of
10 the “injury in fact” and “lost money or property” requirements to pending cases. *Yoshioka v.*
11 *Superior Court* (1997) 58 Cal. App. 4th 972, 981-982, the Court held, “Retrospective application
12 of a statute is constitutional as long as it does not deprive a person of a substantive right
13 without due process of law. ... Such alteration is only forbidden when at the very least the party
14 is deprived of *every reasonable method of securing just compensation.*”
15

16 A hypothetical plaintiff who loses the ability to pursue a UCL claim because she cannot
17 plead or prove “injury in fact” and “lost money or property” has (by definition) not lost any
18 money or property, so her ability to secure just compensation is not relevant. A hypothetical
19 plaintiff who cannot meet the new standing requirement may be theoretically deprived of the
20 ability to pursue injunctive or declaratory relief, but this is not of constitutional concern because
21 one cannot have a vested interest in the ability to obtain prospective injunctive or declaratory
22 relief.
23

24 Furthermore, the hypothetical plaintiff who loses the ability to pursue her UCL claim is
25 probably not deprived of the ability to obtain injunctive or declaratory relief. Any lost
26

1 “unlawful” claim would have borrowed from an underlying statute and the lost “unfair” claim
2 would have been tethered to an underlying statute. *Gregory v. Albertson's, Inc.* (2002) 104 Cal.
3 App. 4th 845, 854.³ Lacking a UCL claim, the hypothetical plaintiff could still bring a common
4 law tort claim, reference a statute in the context of Evidence Code 669, and seek injunctive or
5 declaratory relief. The lost “fraudulent” claim could be replaced with a claim for common law
6 fraud.

9 CLASS ACTION ISSUES

10 Proposition 64 amended section 17203 to state, “Any person may pursue representative
11 claims or relief on behalf of others only if the claimant meets the standing requirements of
12 Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these
13 limitations do not apply to claims brought under this chapter by the Attorney General, or any
14 district attorney, county counsel, city attorney, or city prosecutor in this state.”

15 This amendment is effective immediately because it is a clarifying amendment.
16 Clarifying amendments are effective immediately because they are not intended to change rights
17 or obligations. *Southbay Creditors Trust v. General Motors Acceptance Corp.* (1999) 69 Cal.
18 App. 4th 1068, 1080 (“the enactment of a statute or an amendment to a statute for the purpose of
19 clarifying preexisting law or making express the original legislative intent is not considered a
20

21
22 ³ The standard for an “unfair” consumer claim remains in flux at the Court of Appeal level. “The Supreme Court
23 has not yet enunciated a legal test for unfairness in consumer actions under the unfair competition law.” *Kunert v.*
24 *Mission Financial Services Corp.* (2003) 110 Cal. App. 4th 242, 265. Compare *Quacchia v. DaimlerChrysler*
25 *Corp.* (2004) 122 Cal. App. 4th 1442, 1453 (“Plaintiff is correct that conduct can be “unfair” even if no other law
26 prohibits the challenged conduct. ... In the context of consumer cases, “unfairness is determined by weighing the
utility of the practice against the gravity of the harm to the consumer.”) with *Textron Financial Corp. v. National*
Union Fire Ins. Co. (2004) 118 Cal. App. 4th 1061, 1072-1073 (“given the Supreme Court’s disapproval of *State*
Farm’s “amorphous” definition of “unfair” practices and its focus on legislatively declared public policy, reliance on
general common law principles to support a cause of action for unfair competition is unavailing.”) and *Scripps*

1 change in the law; .. it simply states the law as it was all the time, and no question of retroactive
2 application is involved”); *Edward Fineman Co. v. Superior Court* (1998) 66 Cal. App. 4th 1110,
3 1124 (“However, it is also well established that the enactment of a statute or an amendment to a
4 statute for the purpose of clarifying preexisting law or making express the original legislative
5 intent is not considered a change in the law; in legal theory it simply states the law as it was all
6 the time, and no question of retroactive application is involved”).

7
8 The amendment has three components: “Any person may pursue representative claims or
9 relief on behalf of others only if the claimant (1) meets the standing requirements of Section
10 17204 and (2) complies with Section 382 of the Code of Civil Procedure, (3) but these
11 limitations do not apply to claims brought under this chapter by the Attorney General, or any
12 district attorney, county counsel, city attorney, or city prosecutor in this state.”

13 The requirement that plaintiffs meet the standing requirements of Section 17204 is
14 surplusage. Under Section 17204, any person who is not a government entity must meet the
15 requirements of Section 17204.

16
17 The requirement that plaintiffs comply with Section 382 of the Code of Civil Procedure
18 before they can “pursue representative claims or relief on behalf of others” is largely declarative
19 of existing law. C.C.P. 367 states, “Except as provided by law, every action must be prosecuted
20 by the party in interest.” This longstanding statute prohibits persons from pursuing claims or
21 relief on behalf of absent persons except as provided by a specific statute. C.C.P. 382 permits
22 class actions and in *Corbett v. Superior Court* (2002) 101 Cal. App. 4th 649, the court held that
23 individual UCL claims could be aggregated through the class action mechanism. Therefore, the
24

25
26 *Clinic v. Superior Court* (2003) 108 Cal. App. 4th 917, 940 (“we read *Cel-Tech* to require that the public policy which is a predicate to the action must be ‘tethered’ to specific constitutional, statutory or regulatory provisions.”)

1 amendment to section 17203 will arguably affect only those limited situations where statutes
2 other than C.C.P. 382 have permitted representative lawsuits. See C.C.P. 369.5 (associations).

3 The statement that public prosecutors can represent the general public without class
4 certification is declarative of existing law. *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*
5 (2002) 104 Cal. App. 4th 508, 530-533 (UCL claim by Attorney General resulted in affirming
6 trial court order awarding restitution to injured members of the public). See also *General Tel.*
7 *Co. v. E.E.O.C.* (1980) 446 U.S. 318, 327-331 (EEOC claims in the interest of the public do not
8 require class certification).
9

10 The Court anticipates that the need to obtain class certification to represent absent
11 persons will result in several requests to file amended complaints adding class allegations. The
12 Court will permit Plaintiffs who have previously alleged claims in the interest of the public leave
13 to amend to add class action allegations. The Court does not resolve whether any new class
14 allegations will relate back to the filing of a claim in the interest of the public.
15

16 OTHER ASPECTS OF PROPOSITION 64. 17

18 The parties have not discussed and the Court does not addressed how the amendments to
19 Business and Professions Code Sections 17206 and 17536 made by Proposition 64 Sections 4
20 and 6 affect currently pending cases.
21

22 APPLICATION TO INDIVIDUAL CASES. 23

24 Following the Court's decision on a template for applying the various sections of
25 Proposition 64 to pending cases, the Court will apply that template to the various cases that have
26

1 motions pending on February 10, 2004. The Court expects that after the template is in place the
2 application of that template to any individual case will be a relatively simple process.

3
4 **JUDICIAL NOTICE.**

5 The Court has taken judicial notice of the Official Voter Guide for the November 2,
6 2004, election. The Court has also taken judicial notice of the decisions of other trial courts,
7 although other trial court decisions are not binding on this court.
8

9
10 **STAY OF PROCEEDINGS.**

11 The Court stays until April 1, 2005, all UCL claims by private persons in the interest of
12 the general public. Plaintiffs and Defendants may not prosecute these claims until it is
13 determined whether the Attorney General or the Alameda County District Attorney intend to
14 continue prosecution on behalf of the general public. This does not stay cases to the extent they
15 involve UCL claims on behalf of private individuals or classes.
16

17
18 **SERVICE.**

19 The Court sent this tentative decision to counsel in all the above cases by e-mail on
20 January 28, 2005. The Court also sent this tentative decision by e-mail on January 28, 2005, to
21 (1) Albert Shelden, Acting Senior Asst AG Consumer Law Section, San Diego CA, (2) Ed Weil,
22 Supervising Deputy AG, Office of the Attorney General, Oakland, CA, and (3) Christopher
23 Carpenter, Assistant District Attorney, Alameda County District Attorney's Office, Oakland,
24 CA.
25
26

1 APPELLATE REVIEW

2 This is an issue that would benefit from interlocutory appellate review. C.C.P. 166.1.
3 Prompt review is appropriate because (1) resolution of this issue will materially advance the
4 conclusion of the above cases and (2) there is substantial grounds for difference of opinion (other
5 trial courts disagree with this court).
6
7
8

9 Dated: February __, 2005

10 Judge Ronald M. Sabraw
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