CASE NO. S132433

IN THE

SUPREME COURT OF CALIFORNIA

Thomas Branick, et al.

Plaintiffs and Appellants

v.

Downey Savings and Loan Association,

Defendant and Respondent

On a Decision from the Court of Appeal,
Second Appellate District, Division Five
Case Number B172981

REPLY TO ANSWER BRIEF ON THE MERITS

Matthew A. Hodel
(State Bar No. 93962)
Michael S. LeBoff
(State Bar No. 204612)
HODEL BRIGGS WINTER LLP
8105 Irvine Center Drive
Suite 1400
Irvine, CA 92618
(949) 450-8040
(949) 450-8033 (facsimile)
mhodel@hbwllp.com

Richard A. Derevan
(State Bar No. 60960)
SNELL & WILMER LLP
600 Anton Boulevard
Suite 1400
Costa Mesa, CA 92626
(714) 427-7000
(714) 427-7799 (facsimile)
rderevan@swlaw.com

Attorneys for Defendant and Respondent
Downey Savings and Loan Association, F.A.

Service on the Attorney General of the State of California and the District Attorney of the County of Los Angeles Required by Business and Professions Code Section 17209 and California Rules of Court 44.5

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Page(s)

FEDERAL STATUTES

STATE STATUTES

Page(s)

OTHER

Introduction

Ignoring a century of established case law applying the Repeal Rule, plaintiffs invite this Court instead to embark on a new path and make a subjective "holistic inquiry" in deciding whether an amended statute should be applied to pending cases. [Answer brief at 30.] This court should decline the invitation. Contrary to plaintiffs' argument, the Repeal Rule retains its validity and applies to bar their action. In contrast, plaintiffs' proposed test is unsupported by any precedent, and if adopted, would bring confusion, not clarity, to this area of the law.

Tellingly, plaintiffs' answer brief does not dispute that all elements traditionally required for the Repeal Rule to apply are present here: (i) the action was pending when the amendment (Proposition 64) was passed; (ii) plaintiffs' lawsuit was based entirely on statute; (iii) Proposition 64 repealed the authority for uninjured plaintiffs to bring UCL actions; and (iv) Proposition 64 does not contain a savings clause. Thus, the Repeal Rule in its ordinary application eliminates plaintiffs' causes of action.

To avoid this result, plaintiffs would relegate the Repeal Rule to the dustbin by making it "relevant only to the extent that it sheds light on legislative (or in this case, voter) intent." [Answer brief at 25-26.] But where, as here, a new enactment repeals the statutory authority on which the action has been brought, subjectively gleaning the legislative history for evidence of intent is unnecessary and inappropriate. The only legislative intent that matters is the existence of either an explicit savings clause or *contemporaneous* legislation limiting the effect of the Repeal Rule. Neither is present here.

Besides the Repeal Rule, two other independent grounds exist to affirm the court of appeal's conclusion that Proposition 64 bars plaintiffs'

claims. First, if the intent of the voters apart from the Repeal Rule is to be considered, the record shows that the voters *did* intend for Proposition 64 to apply to pending cases. Second, because the changes made by Proposition 64 are procedural, not substantive, in nature, they may be applied to pending cases without subjectively investigating voter intent.

Finally, plaintiffs should not be allowed to amend to substitute any new, unrelated plaintiff who meets Proposition 64's standing requirements. Case law and strong public policy call for an end to cases started and controlled by professional plaintiffs.

Downey Savings and Loan Association, F.A. ("Downey Savings") respectfully requests that this Court affirm the lower court's holding that Proposition 64 is retroactive, but reverse the holding that plaintiffs may be allowed to amend their complaint to substitute in any new, unrelated plaintiff.

Legal Discussion

I

The Repeal Rule Requires that Proposition 64 Be Applied to Pending Actions

A. The Repeal Rule is controlling

Plaintiffs bypass the "Repeal Rule," claiming it is just like any other rule of statutory construction, and is "only relevant to the extent that it sheds light on legislative (or, in this case, voter) intent." [Answer brief at 25-26.] In other words, plaintiffs are selling this argument: this Court should ignore the Repeal Rule, and instead "holistically" (whatever that means) determine voter intent. If voter intent holistically shows that the new law applies to pending cases—so the argument goes—then the Repeal

Rule is followed; if voter intent shows otherwise, then the Repeal Rule is cast aside. Put simply, the Repeal Rule, as plaintiffs see it, serves no purpose at all.

Plaintiffs' premise—that this Court should leap-frog the Repeal Rule and move on to a freewheeling, subjective inquiry—is fundamentally wrong. The Repeal Rule stands independently from ordinary inquiries about legislative or voter intent. Consistent with Government Code section 9606, this Court has repeatedly stated the Repeal Rule in terms that do not include ascertaining legislative (or voter) intent, except to determine if the new legislation contains a saving clause: "[a]lthough the courts normally construe statutes to operate prospectively, the courts correlatively hold under common law that when a pending action rests solely on a statutory basis . . . 'a repeal of [the] statute without a saving clause will terminate all pending actions based thereon.'" *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829 (*citing Southern Service Co. v. Los Angeles* (1940) 15 Cal.2d 1, 11-12); *Accord, e.g., Callet v. Alioto* (1930) 210 Cal. 65, 67 ("It is also a general rule . . . that a cause of action or remedy dependent on a statute falls with a repeal of that statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute.").

More than 100 years ago, this Court in *Napa State Hospital v. Flaherty* (1901) 134 Cal. 315, 317 recognized "It is a rule of almost universal application, that, where a right is created wholly by statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause." This Court in its 1978 *Younger* decision unambiguously held: the "*only* legislative intent relevant" in cases governed by this "well settled" Repeal Rule is an intention "to save" pending cases "from the ordinary

effect of repeal illustrated by such cases as *Mann*." *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109-110 (emphasis added). The basic Witkin treatise is in accord. *See* 7 B. Witkin, Summary of California Law (9th ed. 1990) Constitutional Law, § 497, pp. 690-691.

Thus, this Court has routinely applied the Repeal Rule unless a saving clause exists or other legislation, *passed in the same session of the Legislature*, limits the effect of the repeal. In *Mann*, for example, after the school district began to dismiss a teacher for a marijuana conviction, the Legislature repealed that statutory basis for dismissal. This Court held in no uncertain terms that the Repeal Rule required dismissal of the district's action because a "repeal of [the] statute without a saving clause will terminate all pending actions . . . ." 18 Cal.3d at 829.

Mann cited as support *Southern Service, supra*, which similarly held that the mere repeal of a statutory right or remedy, without a saving clause, "will terminate all pending actions based thereon." *Southern Service, supra*, 15 Cal.2d at 11-12. *Callet, supra*, is perhaps the clearest statement of this application—to apply the rule all the court had to "determine [was] whether [the basis for action] is a right recognized at common law, or whether it is a right based entirely on statute." *Callet, supra*, 210 Cal. at 68.

More recently this Court in *Younger, supra,* identified three simple and clear prerequisites for the Repeal Rule: (i) the proceeding was "wholly dependent on statute"; (ii) the statutory authority for the proceeding has been "effectively repealed"; and (iii) the action is "not final at the time its statutory authorization was repealed." 21 Cal.3d at 109-110. Applying the Repeal Rule, this Court stated that the new legislation "contains no express savings clause and none is implied by contemporaneous legislation." *Id.* at 110.

Two cases plaintiffs rely on for the so-called "primacy" of legislative intent are actually examples of *Younger's* last statement that legislative intent must be found either in an express saving clause or in "contemporaneous legislation." *Traub v. Edwards* (1940) 38 Cal.App.2d 719 forcefully illustrates that the only substitute for an express saving clause is other limiting legislation from the same legislative session. Because one of two statutes enacted in the same session clearly limited the repealing effect of the other, the court concluded the normal Repeal Rule should not be followed. 38 Cal.App.2d at 721. The other case, *Alameda County v. Kuchel* (1948) 32 Cal.2d 193, 198, is to similar effect, with this Court unambiguously relying on the contemporaneous legislation as the sole ground for departing from the Repeal Rule. 32 Cal.2d at 198.

The third case relied upon plaintiffs for their "primacy argument," *Hopkins v. Anderson* (1933) 218 Cal. 62, is distinguishable based on its unique context–a change in law caused the trial court to lose its subject matter jurisdiction after the case was filed. The case was nevertheless tried, and on appeal, the losing party claimed the case should only have been tried in the municipal, rather than, superior court. This Court acknowledged, but chose not to apply, the Repeal Rule, instead relying on a line of cases specific to changes in the appellate jurisdiction that occur after an appeal is perfected. *Id.* at 66. In those cases the Repeal Rule would work an unintended hardship because parties may have previously relied upon the existence of jurisdiction in making tactical decisions to preserve the record for appeal. This Court applied the same reasoning to the problem presented in *Hopkins*. *Id.* at 67. Thus, *Hopkins* is limited to the rare situation where the court's subject matter jurisdiction changes while an action is pending. It should also be underscored that *Hopkins* most definitely does not present the situation, as here, where a statutory remedy is repealed.

Thus, in the instant appeal, unlike *Kuchel* or *Traub*, there is no companion legislation to which plaintiffs can point. Nor are we faced with the rare circumstances of *Hopkins*. Today, as ever, the Repeal Rule is vital and controlling. Just last month the Third District Court of Appeal in *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.* (2005) 131 Cal.App.4th 517, 527-531, applied and noted the controlling vitality of the Repeal Rule.

Plaintiffs rely principally on *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, for the proposition that "statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." [Answer brief at 8.] But *Evangelatos* did not involve the Repeal Rule at all. There this Court considered whether Proposition 51, which modified the traditional *common law* rule of joint and several liability for noneconomic damage, applied to pending cases. *Evangelatos* never even mentioned the Repeal Rule, and for good reason. The Repeal Rule applies only to actions based solely on *statute*; it is inapplicable to actions based on the common law. *Callet, supra,* 210 Cal. at 68 ("[t]his rule [the Repeal Rule] only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law . . . ."). Plaintiffs' extended discussion of *Evangelatos* simply has no relevance.

Plaintiffs' reliance on *Myers v. Phillip Morris Co.* (2002) 28 Cal.4th 828, is similarly misplaced. In *Myers*, plaintiff asserted *common law* claims for "'strict liability, negligence, breach of implied warranties, fraud, and negligent misrepresentation'" 28 Cal.4th at 832 (citation omitted). The "repeal" in *Myers* abrogated an immunity *defense* the cigarette industry had enjoyed for a fixed period of time under Civil Code § 1714.45. This Court held that defendant's conduct during the period it enjoyed immunity could

not be used as a basis for liability because to do so would violate a distinct rule—not applicable here—that, absent clear legislative intent, a statute may not be applied so as to change the legal effect of past conduct by making "tortious" conduct that was "lawful" at the time it occurred. *Id.* at 839-40. For the same reasons, plaintiffs cannot rely upon *McClung v. Employment Dev. Dep't.* (2004) 34 Cal. 4th 467, 470, 476, where this Court held that an amendment that "impose[d] personal liability on persons" for "actions not subject to liability when taken" could not be applied to defendant's pre-enactment conduct. *See also Fox v. Alexis* (1985) 38 Cal.3d 621, 624 (statute increasing penalties for drunk driving would not apply to offenses committed before the new statute was enacted).

Citing cases where courts considered voter pamphlet information in ascertaining voters' intent, plaintiffs claim that Proposition 64 should not apply to their pending action because it "contains no express declaration of retrospectivity." [Answer brief at 10.] But none of these cases involved the Repeal Rule. They either involved common law proceedings to which the Repeal Rule does not apply, or simple questions of interpreting statutory language where retroactivity was not in issue. [Answer brief at 9-13 (citing *People v. Rizo* (2000) 22 Cal.4th 681 (retroactivity not in question; interpretation only); *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 (retroactivity not involved; issue involved proper interpretation of Civil Code § 3333.4); *In re Littlefield* (1993) 5 Cal.4th 122, 130-131 (upholding contempt power when defense attorney refused to comply with Proposition 115's disclosure requirements); *In re Lance W.* (1985) 37 Cal.3d 873, 887 (interpreting constitutional amendment adopted by statute that affects "rules [that] are of *judicial* creation") (emphasis added); *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 979 (applying Proposition 213 retroactively, which prohibited uninsured drivers from collecting

noneconomic damages—no discussion of Repeal Rule); *Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 812, 818 (Proposition 51, which modified the "traditional principle of joint and several liability," could not be applied retroactively).

Thus, plaintiffs have no cases supporting their claim that "initiative drafters are now fully on notice that silence gives rise to a presumption that the voters intended only a prospective application." [Answer brief at 14.] To the contrary, the initiative drafters knew they were repealing a purely statutory creation. They were "on notice" that the Repeal Rule would ineluctably require retroactivity.

Nor are the other "intent" cases cited by plaintiffs helpful to them. *In re Pedro T.* (1994) 8 Cal.4th 1041, is a criminal case where defendant committed a specified offense during a three-year period when an increased punishment statute was in effect, but was not convicted until after the statute expired. There was no statute repealing a prior statute and this Court therefore had no occasion to discuss the Repeal Rule. 8 Cal.4th at 1046. *See also People v. Nasalga* (1996) 12 Cal.4th 784, 793-94 (refusing to extend the holding in *Pedro T.*)

Gartner v. Roth (1945) 26 Cal.2d 184, dealt with a 1943 statute that "postponed" the effect of a prior statute due to World War II. This Court did not discuss or rely on the Repeal Rule, nor could it, because there was no "action" pending when the new statute was enacted. The majority and dissent simply debated—without reference to the Repeal Rule—whether the Legislature intended the 1943 act to apply to previously completed property transfers to the state.

Finally, the two most recent cases plaintiffs cite do discuss the Repeal Rule, but are not helpful to them. In *Kleemann v. W.C.A.B.* (2005)

127 Cal.App.4th 274, an injured worker argued that amendments to the workers' compensation laws should not apply because they were enacted *after* his injury occurred. The court favorably cited the Repeal Rule in the precise way Downey Savings argues this Court should apply it here. *See Id.* at 283. The court also was faced with an entirely different context than the instant case: "the law in force . . . normally determines the right of recovery *in workers' compensation* . . . . Such changes are not given retrospective operation without clear indication the Legislature so intended." *Id.* at 281, n. 4 (emphasis added). Nonetheless, as to the purely procedural amendments, the court stated that they "may be *applied to pending cases without further analysis* . . . ." *Id.* at 284 (emphasis added). As to the substantive amendments, the court did consider intent, as well it should, because the legislature in the new law *expressly* made it applicable regardless of the date of injury. *Id.* at 285-86. Thus, *Kleemann,* distinguishable due to its workers' compensation setting, nonetheless clearly recognizes the cogency of the Repeal Rule.[1]

The second recent case cited by plaintiffs, *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises* (2005) 129 Cal.App.4th 540 is simply wrong. It involves the very issue in this case, namely, whether Proposition 64 applies to pending cases.[2] *Kintetsu* makes at least three mistakes. First, it assumes that because only a portion of the statute was modified then the Repeal Rule must not apply. 129 Cal.App.4th at 570-71. This is simply not the law. The Repeal Rule applies even if only a portion of the statute is

---

[1] Moreover, one day after plaintiffs filed their brief, the court in *Rio Linda Union Sch. Dist. v. W.C.A.B., supra,* (2005) 131 Cal.App.4th 517, 528-529, found the same amendment to the workers' compensation statutes applied to pending cases. In *Rio Linda,* the court heavily relied on and directly applied the Repeal Rule. *Id.* at 527-531.

[2] Petitions for review from the *Kintetsu* decision are currently pending. No. S135587.

repealed or amended. *See* Section I.B, *infra*. Second, it argues that the Repeal Rule does not apply to initiatives absent evidence that the voters intended for the Repeal Rule to apply. 129 Cal.App.4th at 571. Again, that is not the law. No case applying the Repeal Rule limits its application to *legislative*, as opposed to *voter* enactments. Instead the cases all agree that such rule applies *absent a saving clause*. *See, e.g., Younger*, *supra*, 21 Cal.3d at 109; *Mann*, *supra*, 18 Cal.3d at 822-823, 828-831. Thus, the *Kintetsu* court mistakenly changes the Repeal Rule by eliminating the requirement for a saving clause. Third, *Kintetsu* reasons that because there is no longer standing, there is some exception to the Repeal Rule. 129 Cal.App.4th at 573-74. There is no such exception. And, the court was wrong in equating standing to a "jurisdictional" change. The court still has jurisdiction, but the plaintiff no longer has a claim. If *Kintetsu* is correct, every time a statutory right to sue is eliminated, then the Repeal Rule is not to be followed. This would be contrary to at least 100 years of California law.

After all this, plaintiffs are left with little more than to ask this court to "conduct a more holistic inquiry." [Answer brief at 30.] Their bald assertion that after the Repeal Rule was formulated common law actions (which are not subject to the rule) have faded from prominence, while statutory actions (which are subject to the rule) have become more important [Answer brief at 26-30], is unsupported by any authority. One need only look to the number of negligence, strict liability, and other common law actions that make up the trial courts' dockets to know that plaintiffs are making argument from whole cloth. Second, if the Repeal Rule were disregarded as plaintiffs urge, it would thwart the democratic process by substituting judicial lawmaking for that of the legislative and initiative processes.

B. The statutory Repeal Rule applies to Proposition 64 even though it repeals only portions of the UCL

Plaintiffs also incorrectly suggest the Repeal Rule applies only where an *entire* cause of action or remedy is eliminated. Plaintiffs are wrong. The Repeal Rule applies not only where an entire statutory scheme is repealed, but where (as here) a new amendment withdraws or modifies the former authority on which a purely statutory claim was based. *See, e.g., Wolf v. Pacific Southwest Discount Corp.* (1937) 10 Cal. 2d 183, 184-85 (applying the Repeal Rule even though voters' amendment did not "repeal the usury law of the state" or repeal statutory usury claims in all circumstances); *People v. One 1953 Buick 2-Door* (1962) 57 Cal.2d 358, 360-66 (applying the Repeal Rule to statutory vehicle forfeiture proceedings even though new amendment did not abolish forfeiture claims but permitted them only if specified "conditions" were met); *Younger, supra,* 21 Cal. 3d at 109-110 (rule applied to amendment that did not entirely repeal statutory scheme, but which undermined authorization for plaintiff's statutory claim); *Mann, supra,* 18 Cal. 3d at 828-830 (rule applied to amendment effecting a "limited repeal" of existing statute in a manner that "modified the governing statutory scheme" and undermined "statutory authority" for plaintiff's claim); *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 691 (Civil Procedure Code § 425.17, which effected an amendment or partial repeal of Civil Procedure Code § 425.16, applied to cases pending on the effective date of the new statute).

Plaintiffs cite *Krause v. Rarity* (1930) 210 Cal. 644, but that case does not support their argument. *Krause* involved a statutory claim under Code of Civil Procedure section 377 asserted by the heirs of a passenger against a car's driver. This Court found the Repeal Rule inapplicable

because the new statute did *not* "repeal" the heirs' authority "to maintain" their claim against the defendant. *Id.* at 654. The amendment "simply changed the degree of negligence required to permit a recovery" and did not "repeal" the statutory authority for plaintiffs' right of action "in whole or in part." *Id.* at 655. Proposition 64 does precisely what the amendment in *Krause* did not: it repeals plaintiffs' right to maintain their claims.

* * *

In sum, there is nothing unique or challenging about the issues raised by plaintiffs to try to elude the Repeal Rule. Well-established California law closes off their every avenue of escape. Plaintiffs have never disputed that all the elements traditionally required for the Repeal Rule are present. *Younger*, *supra*, 21 Cal.3d at 109; *Mann*, *supra*, 18 Cal.3d at 822-823, 828-831. First, there is no dispute that plaintiffs' action was pending when Proposition 64 was passed. Second, plaintiffs' lawsuit was based entirely on the UCL, which courts have repeatedly determined is a pure statutory right as applied to *uninjured* plaintiffs. *See, e.g., Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1263-64 (statutory claims under the UCL "cannot be equated" with the common law tort of unfair competition); *Barquis v. Merchants Collection Association of Oakland, Inc.* (1972) 7 Cal.3d 94, 109 (holding Civil Code § 3369, the predecessor to the UCL, cannot be equated with the common law definition of "unfair competition"). Plaintiffs cite no authority to the contrary. Third, Proposition 64 repealed the private attorney general provisions of the UCL, upon which plaintiffs based their case. Lastly, Proposition 64 does not contain a saving clause, and plaintiffs do not argue otherwise.

II

Independent of the Repeal Rule, Proposition 64 Was Intended to Apply to Pending Actions

The Repeal Rule prohibits the subjective inquiry into "intent" sought by plaintiffs. But if we are to engage in this search, plaintiffs still must lose.

Proposition 64 was intended to stop the abusive lawsuits filed by opportunists (aka, the uninjured, the unsupervised, and the unaccountable) and their attorneys. Note well, Proposition 64 does not speak of these litigants winning cases they should not win. Instead, it speaks of clogged courts, jobs lost, rising prices, and businesses leaving California *due merely to the existence of this litigation*. *See* Downey Opening Brief at pp. 7-8. The people "found and declare" that they wanted to "eliminate" the abuses of these lawsuits. Text of Proposition 64, Section 1(d).

"Eliminate" means "to get rid of; remove." *The American Heritage Dictionary of the English Language* (3d ed. 1996) It does not mean "allow them to continue" as plaintiffs assert. Thus, the plain reading of Proposition 64 confirms that the only lawsuits the voters sought to "preserve" were those of individuals seeking relief for injuries they have actually suffered.

Moreover, section 1(f) of the new law permits only the Attorney General and appropriate local officials to "prosecute" UCL actions on behalf of the general public. As shown in Downey Savings' opening brief on the merits, to "prosecute" can only have one meaning in this context. *See* Downey Opening Brief at 7. If only the Attorney General and other public officials may prosecute actions on behalf of the general public, it

follows that voters intended that private attorneys, like those representing plaintiffs here, may not.

Hence, viewing the text of Proposition 64 and the voter materials "as a whole"—as plaintiffs urge [Answer brief at 12]—confirms an intention that it apply to and eliminate pending actions where (as here) the plaintiffs were not injured. It is the cost and abuses of those *pending cases* that cause the harm. How do we know that? The voters said so. Nothing suggests voters were contemplating an exception to the Repeal Rule by grandfathering in all the harm that will be caused by the numerous pending cases brought by uninjured plaintiffs.

III

Proposition 64 Constitutes a Procedural Change to the UCL, and Therefore Should Be Given Retrospective Application

A third reason for applying Proposition 64 to pending actions is that Proposition 64 repealed "procedural" rather than "substantive" elements of the UCL. Procedural changes *are* applied to pending actions. *See, e.g., Republic Corp. v. Superior Court* (1984) 160 Cal.App.3d 1253, 1257 ("A lawsuit is governed by a change in procedural rules made during its pendency, and the suit is pending until its final determination on appeal.") (quoting *Olson v. Hickman* (1972) 25 Cal.App.3d 920, 922).

A new enactment has a "retrospective effect" only "when it substantially changes the legal consequences of past events." *See, e.g., Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243; *accord, McClung, supra*, 34 Cal.4th at 471; *Kizer v. Hanna* (1989) 48 Cal.3d 1, 7; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289-91 (new enactment is not retrospective unless it actually "change[s] the legal

consequences of [the parties'] past conduct," typically "by imposing new or different liabilities based upon such conduct").

Plaintiffs are critical of Downey Savings' citation to *Parsons v. Ticker* (1995) 31 Cal.App.4th 1513, because—according to plaintiffs—the new statute in that case "explicitly" applied to all pending cases. [Answer brief at 36.] In reality, however, the *Parsons* court relied on the long-standing rule that procedural changes may be applied to pending actions. *Id.* at 1523.

Plaintiffs also liken the changes here to those in *Aetna Cas. & Surety Co. v. Industrial Accident Comm.* (1947) 30 Cal.2d 388 and *Elsner v. Uveges* (2004) 34 Cal.4th 915, which found no retroactivity. Not so. *Aetna* involved an amendment to the workers' compensation laws that increased the damages available against an employer in certain circumstances. 30 Cal.2d at 391. That amendment, if applied to the defendant's past conduct, would have had a retroactive substantive effect of *expanding the defendants' liability* for past conduct. Hence, this Court held that the new amendment was "substantive in its effect" because it "increased the amount of compensation above what was payable at the date of the injury" and "impos[ed] a new or additional liability" on defendant's past conduct. *Id.* at 391-95.

Elsner also involved a substantive change that would have increased the defendant's liability for past acts; thus, the change was not retroactive. This Court held that "[t]he admission of provisions imposing broader duties on a defendant than existed under the common law expands the defendant's liability. It attaches tort liability to the violation of statutes and regulations that previously could give rise only to civil and criminal penalties." 34 Cal.4th at 937.

In contrast to the laws considered in *Aetna* and *Elsner*, Proposition 64 does not change the consequences of past conduct. Any conduct that was actionable under the UCL pre-Proposition 64 is still actionable under the UCL post-Proposition 64.

Finally, equally misplaced is plaintiffs' reliance on a footnote in *Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, for the proposition that new procedural laws affecting the filing of complaints do not apply to complaints already filed. To claim, as plaintiffs do, that standing has relevance only when filing a complaint, is to completely misunderstand the laws of standing. The standing requirement does not end at the filing window, it must be maintained through to the final conclusion of the lawsuit. *See, e.g., Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000 ("Lack of standing may be raised at any time in the proceedings, including at trial or in an appeal."). Furthermore, the argument that *Landgraf* is relevant ignores that, unlike California law, the general provisions of the United States Code have, for over 130 years, contained a *federal general saving clause*. 1 U.S.C. § 109; *see also Korshin v. C.I.R.* (4th Cir. 1996) 91 F.3d 670, 673. In contrast to Congress' abolition of the common law's Repeal Rule, the California Legislature codified it. (*See, e.g.*, Cal. Gov. Code, § 9606; *People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 75 (section 9606's predecessor "cod[ified]" the common law Repeal Rule)).

Accordingly, because Proposition 64 does not change the consequences of past conduct, but merely alters how UCL lawsuits may proceed, it should be applied to pending cases.

IV

Plaintiffs Should Not Be Allowed Leave to Amend to Substitute Plaintiffs

Plaintiffs, in seeking to amend to add new, unrelated plaintiffs, primarily rely on *Klopstock v. Superior Court* (1941) 17 Cal.2d 13 and other cases where amendment was required due to a "mistake or misnomer" in the naming of a plaintiff, and not a new law specifically designed to prevent the current plaintiffs from pursuing the litigation. Here, there was no mistake or misnomer. In addition, as stated in Downey Savings' opening brief, in *Klopstock*, unlike here, the old and new plaintiffs were closely associated parties asserting derivative rights of the same corporation. Thus, the identity of the named plaintiff was never particularly important in *Klopstock*, because "the corporation is the ultimate beneficiary of such a derivative suit, it is clear that the particular stockholder who brings the suit is merely a nominal party plaintiff." *Id.* at 21. Here, there are no derivative rights because the current plaintiffs have no rights or interest at all.

Likewise, plaintiffs are too quick to dismiss more on point cases like *Diliberti v. Stage Call Corp.* (1992) 4 Cal.App.4th 1468. The logic of *Diliberti* continues to be controlling: because the current plaintiffs have no rights under any theory, the new plaintiff can only have different, independent rights. As such, there can be no substitution. *Id.* at 1471 (citing *Bartalo v. Superior Court* (1975) 51 Cal.App.3d 526).

Plaintiffs also incorrectly dismiss the Fifth Circuit's opinion in *Summit Office Park, Inc. v. U.S. Steel Corp.* (5th Cir. 1981) 639 F.2d 1278. There, a class action plaintiff was divested of standing while his lawsuit was pending. There, as here, plaintiff then sought leave to amend to

substitute in a new plaintiff with standing. The similarities between this case and *Summit Office Park* do not end there: "the original plaintiff was left with no cause of action upon which it could recover as the result of an intervening Supreme Court decision." *Id.* at 1282. As here, "[t]here was no way in which the plaintiff could properly amend the complaint to give it a cause of action. Plaintiff had no identity of interest with either the new proposed plaintiffs, or the new class named in the complaint, or their cause of action." *Id.*

Accordingly, the Fifth Circuit concluded that "[s]ince there was no plaintiff before the court with a valid cause of action, there was no proper party available to amend the complaint." *Id.*; *see also Brake v. Payne* (Sup. Ct. Va. 2004) 597 S.E.2d 59, 63 ("[A] new plaintiff may not be substituted for an original plaintiff who lacked standing to bring the suit. Such a substitution amounts to the assertion of a new cause of action. In that situation, the sole remedy is a nonsuit followed by a new action brought in the name of a proper plaintiff." (internal quotations and citations omitted)).

Plaintiffs, relying on a footnote, contend that the Fifth Circuit in *Summit Office Park* approved of substituting new plaintiffs where they seek to enforce substantively identical claims on behalf of the same represented group. In footnote 12, however, the Fifth Circuit merely acknowledged the entirely different rule that allows the substitution of class action plaintiffs where none of the plaintiffs had claims within the jurisdictional amount, yet the original plaintiffs, unlike in this case, still retained a stake in the outcome of the litigation. 639 F.2d 1278 n.12.

Accordingly, plaintiffs should not be given an opportunity to amend their complaint to add any new, unrelated plaintiff.

V

Any Amended Complaint Should Not Relate Back to the Filing of the Original Complaint

Finally, plaintiffs contend that any amended complaint would be based on the "same injury" as the current complaint, and therefore, the relation back doctrine should apply. That is not possible. The current plaintiffs have no injury. They also cannot claim to have been speaking for anyone at all: "[T]the reality is that often UCL actions will not be on behalf of a class because class plaintiffs must be 'truly representative of the absent, unnamed class members.'" *Corbett v. Sup.Ct. (Bank of America, N.A.)* (2002) 101 Cal.App.4th 649, 671 fn.10 *citing Bartlett v. Hawaiian Village, Inc.* (1978) 87 Cal.App.3d 435, 438.

It is evident, too, when one considers the kitchen-sink allegations in the complaint, that plaintiffs cannot, with a straight face, claim the new unknown plaintiffs will have the "same injury." Plaintiffs alleged a laundry list of alleged unfair business practices. Will the new plaintiff have suffered injury and fact and lost money as a result of each and every one of these alleged practices? Or none at all? What if that new plaintiff was only injured by some of these alleged practices? That would alter the claims at issue in this lawsuit. Moreover, what if this new plaintiff, who actually did business with Downey Savings, wants to complain about other business practices, which are not part of the complaint or seek additional remedies? Could the amended complaint include these new claims and relate back as to them? If so, the amended complaint would add new liabilities in violation of the relation-back doctrine.

Worse, new plaintiffs may try to expand the remedies, even though their claims, and hence any remedy that accompanies them, would have

been time-barred, but for the relation back. Under the previous UCL a court could not order restitution in the form of disgorgement into a "fluid recovery fund." Plaintiffs in the old UCL could obtain restitution *only for themselves* and not for the public at large. *See Kraus v. Trinity Mgmt. Services, Inc.* (2000) 23 Cal.4th 116, 137. But in a class action, the recovery may be for *all persons harmed* (except those who affirmatively opt out). *Corbett, supra*, 101 Cal.App.4th at 668-669 (disgorgement into fluid recovery fund may be ordered in true class action based on violations of unfair competition law).[3]

Until now Downey was not facing the possibility of imposition of a fluid recovery fund. It had the right to assume the statute of limitations was running against claimants who might have been entitled to such relief, but who elected to sit on the sidelines. But now, if plaintiffs have their way, new claimants will seek to evade a time bar and substantially up the stakes by appearing in the case and seeking a fluid recovery and fully enjoy the tolling effect of plaintiffs' lawsuit. This would be impermissible under existing law. *Bartalo v. Superior Court, supra*, 51 Cal.App.3d at 530-531 ("normal 'retroactivity' of most civil decisions has never been thought to supersede the operation of the statute of limitations so as to revive old claims which were not pursued because of a previously prevailing contrary rule of law, (fn omitted) or to reincarnate dead causes which had fallen to the sword of the statute."). Accord, Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial, Ch. 6-E, § 6:787 ("a new plaintiff *cannot* be joined after the statute of limitations has run where he or she seeks to enforce an *independent right* or *to impose greater liability upon the defendant*." (emphasis in the original and added). *See also*, Stern, Cal. Prac. Guide:

[3] As the *Corbett* court observed: "We emphasize that there is absolutely no dispute that a UCL claim is procedurally distinct from a class action and that the two have different purposes." 101 Cal.App.4th at 658.

Bus. & Prof. Code Section 17200 Practice, Ch. 5-I, § 5:293 (the mere filing of a non-class UCL action likely will not toll the statute of limitations for absent parties).

Fundamentally, plaintiffs ignore that in passing Proposition 64, the California voters overwhelmingly stated that they did not want professional plaintiffs to continue to prosecute UCL actions. In other words, it should be deeply troubling to this Court that the moving party seeking such an amendment would be an unqualified, uninjured plaintiff with no stake in the litigation. Such a disinterested, unsupervised party (and one the voters disqualified) should not be allowed to define the alleged "same injury," pick the qualified plaintiffs, and set the crucial terms of the amended complaint.

Moreover, plaintiffs also ignore that their positions would lead to plaintiffs' class-action lawyers improperly using professional plaintiffs with no standing as "place-holders" to toll the statute of limitations, or to improper attorney solicitation of potential clients. *See* Downey Opening Brief at 18-19.

Conclusion

For the reasons stated above, Downey Savings respectfully requests that this Court (1) affirm the court of appeal's holding that Proposition 64 applies to pending actions and (2) reverse the court of appeal's holding permitting plaintiffs divested of standing under Proposition 64 to move to substitute in any new, unrelated plaintiff.

Dated: August 26, 2005

HODEL BRIGGS WINTER LLP
Matthew A. Hodel
Michael S. LeBoff

SNELL & WILMER L.L.P.
Richard A. Derevan

By: Matthew A. Hodel
Matthew A. Hodel
Attorneys for Petitioner, Downey Savings and Loan Association, F.A.

Certificate of Word Count

The undersigned certify that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 6,050 words, exclusive of the matters that may be omitted under rule 29.1(c)(1).

Dated: August 26, 2005

HODEL BRIGGS WINTER LLP
Matthew A. Hodel
Michael S. LeBoff

SNELL & WILMER L.L.P.
Richard A. Derevan

By: Matthew A. Hodel
Matthew A. Hodel
Attorneys for Petitioner, Downey Savings and Loan Association, F.A.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18, and not a party to the within action. My business address is Hodel Briggs Winter LLP, 8105 Irvine Center Drive, Suite 1400, Irvine, CA 92618.

On August 29, 2005, I served the foregoing document(s) described as:

REPLY TO ANSWER BRIEF ON THE MERITS

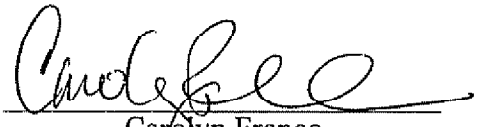
on the interested parties by placing a true copy thereof in a sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

VIA OVERNIGHT MAIL: VIA UPS: By delivering such document(s) to an overnight mail service or an authorized courier in a sealed envelope or package designated by the express service courier addressed to the person(s) on whom it is to be served.

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

Executed on August 29, 2005, at Irvine, California.



Carolyn France

SERVICE LIST

Counsel for Plaintiffs

Jeff S. Westerman
Sabrina S. Kim
Milberg Weiss Bershad &
Schulman LLP
355 S. Grand Avenue
Suite 4170
Los Angeles, CA 90071
(213) 617-1200
(213) 617-1975 (facsimile)

Raymond P. Boucher
Patrick DeBlase
Anthony M. DeMarco
Kiesel, Boucher & Larson LLP
8648 Wilshire Boulevard
Beverly Hills, CA 90211-2910
(310) 854-4444
(310) 854-0812 (facsimile)

Peter Sloane
Milberg Weiss Bershad &
Schulman LLP
One Pennsylvania Plaza
New York, NY 10119-0165
(212) 594-5300
(212) 868-1229 (facsimile)

Pamela M. Parker
Timothy G. Blood
Kevin K. Green
Lerach Coughlin Stoia Geller
Rudman & Robbins LLP
401 B Street, Suite 1600
San Diego, CA 92101-4297
(619) 231-1058
(619) 231-7423 (facsimile)

Courtesy Copies

Bill Lockyer
Attorney General of California
Office of the Attorney General
1300 "I" Street
Sacramento, CA 94244-2550

Steve Cooley
District Attorney of Los Angeles
Clara Shortridge Foltz
Criminal Justice Center
210 W. Temple Street
Los Angeles, CA 90012

The Honorable Wendell Mortimer, Jr.
Los Angeles Superior Court
Central Civil West Courthouse
Department 307
600 S. Commonwealth Avenue
Los Angeles, CA 90045

Office of the Clerk
Court of Appeal
Second Appellate District
300 S. Spring Street
Second Floor, North Tower
Los Angeles, CA 90013-1213