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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CALIFORNIA LAW INSTITUTE, in a representative capacity, Plaintiff, v. VISA USA, INC., a foreign corporation, MASTERCARD INTERNATIONAL, INC., a foreign corporation, and DOES 1 through 1,000, inclusive, Defendants.	Case No. CGC-03-421180 **PLAINTIFF CALIFORNIA LAW INSTITUTE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS** Date: Time: Department: 304 Judge Richard A. Kramer Trial Date: None

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Plaintiff California Law Institute, Inc. ("CLI") herewith opposes the motion for judgment on the pleadings filed by MasterCard International, Inc. and VISA USA, Inc. ("Defendants").

The present suit was commenced, and is being pursued, by CLI as a private attorney general under the Unfair Competition Law ("UCL"), Business & Professions Code 17200, *et. seq.*, as it existed prior to Proposition 64's passage. CLI agrees that if Proposition 64's changes to the UCL are applied retroactively to pending litigation, then it lacks standing to continue to pursue this lawsuit. However, CLI does not agree that Proposition 64's changes apply retroactively to pending lawsuits, including this one. Accordingly, Defendants' motion should be denied and this litigation should continue.

I. PROPOSITION 64 DOES NOT APPLY TO PENDING CASES.

On November 10, 2004, Sacramento County Superior Court Judge Thomas M. Cecil ruled, succinctly and directly, that Proposition 64 does not retroactively apply to pending cases[1]:

> The well-settled rule is that statutes, and initiatives, are presumed to operate prospectively only absent an explicit expression otherwise. *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287. The language of Proposition 64 is completely silent on whether it is to be applied retroactively. The voter information material is similarly silent. In such cases, it may be applied only prospectively. *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1194 (holding that Proposition 51 operated prospectively only as the language did not indicate the measure was to apply retroactively). *Compare, Jenkins v. County of Los Angeles* (1999) 74 Cal. App. 4th 524, 536 (language of Proposition 213 included statement that the act "shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997."). The Court notes that Propositions 69 and 66 on this year's ballot each include express language concerning retroactive application.

Rothken Declaration at Ex. A ("*Twomey*") (also addressing Defendants' contention here that Proposition 64 is so significant that the voters must have intended it to apply retroactively).

As Judge Cecil's decision recognizes, the seminal and leading case in California on the

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[1] In addition, the First District has, at least implicitly, rejected applying Proposition 64 to pending cases. In *Krumme v. Mercury Insurance Company*, Case No. A103046 (1st Dist., Div. 4 2004) (published at 123 Cal.App.4th 924), a petition for rehearing was filed after Proposition 64's enactment and the and the appellants/defendants raised the issue directly. The Court, in turn, required further briefing on the matter, and many of the points raised herein were put forward before the Court. On November 29, 2004, after the briefing, however, the First District summarily denied the petition. *See* Rothken Decl., Exs. B (rehearing petition); C (answer); and D (disposition).

retroactivity of statutes is *Evangelatos.* Indeed, it is fair to say that *Evangelatos* is the leading modern case on the issue, and it has been approvingly and repeatedly relied upon by the Supreme Court in recent years. *See, e.g.*, *McClung v. Employment Dev. Dept.* (2004) 34 Cal. 4th 467, 20 Cal. Rptr. 3d 428, 435-36 (refusing to give retroactive effect to an amendment to the Fair Employment and Housing Act imposing personal liability for harassment on non-supervisory workers; "[I]t has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.") (citing, *inter alia*, *Evangelatos*; quotation omitted); *Myers v. Philip Morris Cos.* (2002) 28 Cal. 4th 828, 839-842 (primarily relying on *Evangelatos* in evaluating statutory amendment).

Evangelatos and its progeny recognize that the touchstone of whether a statutory change, and especially a ballot initiative, was intended to affect pending litigation or prior rights is a determination of intent, and the intent analysis has been applied equally whether the issue presented relates to legislation limiting or depriving a party of a cause of action or recovery, as in *Evangelatos* itself, or creating a cause of action for conduct not previously subject to liability. *E.g.*, *Rosasco v. Commission on Judicial Performance* (2000) 82 Cal. App. 4th 315, 312-23.

Here, Proposition 64 impacted a fundamental antecedent legal right possessed by CLI (as well as numerous other entities, from the Sierra Club to Consumers Union) of any California "entity" to bring actions to redress harms to general public, a right the Supreme Court upheld in unequivocal terms in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 561-567. Calling an abrupt halt to such cases will require prosecutors or other entities who had abstained from suit to decide between stepping in, if statutes of limitation permit, or allowing the conduct to go unchallenged. Indeed, in some instances, cases which had progressed for years would be halted. *See, e.g.*, *Spielhotz v. Los Angeles Cellular Telephone Co.*, No. BC186787 (Superior Court, Los Angeles) (7 year-old litigation now moving to trial with non-affected representative plaintiff where defendants have moved for judgment on the pleadings based on Proposition 64). As a matter of fundamental justice, this is an unpalatable result and the very reason the courts require retroactivity to be "be the unequivocal and inflexible import of the

terms, and the manifest intention of the legislature." *McClung*, *supra*, 20 Cal. Rptr. 3d at 435; *see Buttram v. Owens-Corning* (1997) 16 Cal. 4th 520, 534 ("Thus, retroactive application of the measure to past litigation could have unexpected and potentially unfair consequences for all parties who acted in reliance on the then-existing state of the law. Prospective application of the measure ... would assure that all parties to litigation were aware of the basic 'ground rules' when they decided whom to join in the action and on what terms the case should be settled." (quoting *Evangelatos*, 44 Cal.3d at 1215-17). The fact that the running of time will cause claims to be time-barred where injured entities did not themselves sue because they were relying on pending Section 17200 lawsuits would alone be unconscionable.

Proposition 64 does not possibly meet the requisite standard of clear intent. Indeed, Defendants do not point to any express language in Proposition 64 or the Voter Information Guide that it should be applied retroactivity. A provision applying Proposition 64 to pending cases was not included in the Proposition, and a "failure to include an express provision for retroactivity is, in and of itself, 'highly persuasive' of a lack of intent in light of [the presumption against retroactivity]." *Russell v. Superior Court* (1986) 185 Cal. App. 4th 810, 818; *Evangelatos*, 44 Cal. 3d at 1221 ("if the proponents of Proposition 51 felt that the liability crisis necessitated a retroactive application of the measure's provisions, it seems evident that they would have included an express retroactivity provision in the proposition."). If anything, Proposition 64's stated electoral intent was to apply the proposition prospectively – *i.e.*, to the filing of UCL cases after its effective date.[2] Nothing in the Proposition suggested it was to apply to pending cases,

[2] Section 1(e) provides: "It is the intent of the California voters . . . to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (Emphasis added.) Neither the Attorney General's title and summary nor the Legislative Analyst's fiscal analysis advised voters that the measure would apply to pending cases. In fact, consistent with the measure's findings, the Legislative Analyst explained that Proposition 64 "prohibits any person, other than the Attorney General and local pubic prosecutors, from bringing a lawsuit for unfair competition unless the person has suffered injury and lost money or property." (Emphasis added.) The proponents' ballot arguments also emphasized Proposition 64 would "[a]llow[] only the Attorney General, district attorneys, and other public officials to file lawsuits on behalf of the People of the State of California . . ." (Emphasis added.) Defendants' reliance on the word "pursue" in the Voter Information Guide (*see* Defs. Mem. at 14-15) is clearly, in context, prospective in nature and subordinate to the repeated references noted above both in the Proposition itself and in the other analyses. The "pursue" language does not evidence the clear voter intent required to overcome the presumption against retroactivity.

and it simply did not put the voters on notice that it would apply to pending cases. *Cf. Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114 ("the voters should get what they enacted, not more and not less.").

Rather, the expression of purpose and intents in Proposition 64 is akin to the one in *Buttram v. Owens-Corning*, where a ballot initiative (the same one as in *Evangelatos*) expressed a clear intent to rectify a perceived "system of inequity and injustice," but without an express statement of retroactivity, was found not to be retroactive:

> In consideration of these express findings, Proposition 51 declares as its purpose "to remedy these inequities" by holding defendants "liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable." (Civ. Code, § 1431.1.) The act "further declare[s] that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses." (*Ibid.*) It is clear from the plain language of Proposition 51 that the remedial tort reform measures it enacted were intended to eliminate the "deep pocket rule" that had "resulted in a system of inequity and injustice."

16 Cal. 4th at 528.

Moreover, as Judge Cecil pointed out, nothing in the voter information material suggests an intention to have Proposition 64 to apply to pending cases. Had the effects of retroactivity been clearly spelled out, including the dismissal of long-pending cases which the judiciary had found to state viable claims on behalf of the general public, such clarity may well have affected the vote. *See Evangelatos*, 44 Cal. 3d at 1219 ("if the potential insurance company windfall from retroactive application had been brought to the attention of the electorate, it might well have detracted from the popularity of the measure."). The drafters of Proposition 64 could have easily made it applicable to pending cases. The drafters of Propositions 66 and 69, for instance, which were on the <u>same</u> ballot as Proposition 64 expressly so provided with respect to those propositions. *See* Rothken Decl., Exs. E and F (text and legislative analyses of Propositions 66 and 69). Those initiatives show the electorate certainly could have voted upon a retroactivity provision had it been desired. In short, "[t]he voters may well have reasoned that from election day forward the liability system would be changed: nothing suggests a clear intent to retroactively effect prior transactions." *Russell*, 183 Cal. App. 4th at 819.

Thus, Defendants (who were among the proponents of Proposition 64) are trying to "have

their cake and eat it too." Having made a strategic decision not even to mention retroactivity or application to pending litigation in the text or ballot arguments, and the electorate having evidenced in no way that it intended to have the law apply to pending cases, the proponents of Proposition 64 should not be permitted to rewrite the law now.

II. DEFENDANTS' ARGUMENTS TO THE CONTRARY ARE WITHOUT MERIT.

A. The "Repeal of a Statutory Right" Argument is Inapplicable.

Defendants talismanically invoke the statutory precept that the repeal of a statutory right or remedy without a savings clause stops all pending actions based on that right. Defendants' invocation of what might be called the "repeal rule" is misplaced for several reasons.

First, it is not insignificant that the repeal rule has never been applied to a case involving a ballot initiative. In every case where courts have referred to the precept, the acts in question have been those of the Legislature itself. The determination of the impact of a ballot initiative on a pending lawsuit, without exception, has entailed discerning the intent of the electorate. This was true even before *Evangelatos*, *see, e.g.*, *Russell, supra*, but has emphatically been the rule since *Evangelatos.* As best as can be determined, where California ballot initiatives have failed to include any language indicating that the measure was to apply retroactively to pending cases, then – apparently without exception – California courts have refused to apply legal changes arising from ballot initiatives to such cases. *E.g.*, *Russell, supra*; *Evangelatos, supra*; *Buttram*, *supra*; *Rosasco, supra*; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287.[3]

Evangelatos and its progeny, however, are not limited to ballot initiatives. As noted, the clear intent analysis has been the touchstone in modern jurisprudence – particularly that of the Supreme Court – in addressing the retroactive application of statutory changes to pending litigation. For example, in *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, the California Supreme Court rejected the argument that the Legislature's repeal of a statute that gave

[3] That the repeal rule is necessarily subordinate to an intent analysis is a necessary corollary of the most fundamental and cardinal rule of all – namely, that all canons of statutory construction are designed to ascertain only one thing: legislative intent. *E.g., Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724 ("We begin with the fundamental rule that our primary task in construing a statute is to determine the Legislature's intent.").

tobacco companies immunity from suit should operate retroactively to revive claims that accrued during the time the statute was in effect. The "repeal rule" could have been mentioned, but never was throughout the decision. Instead, the Court, with its own emphasis, stressed that "'a statute will ***not*** be applied retroactively unless it is ***very clear*** from extrinsic sources that the Legislature ... must have intended a retroactive application." 28 Cal. 4th at 841 (emphasis in original; citing *Evangelatos*, 44 Cal.3d at 1209). Had the repeal rule significant meaning, then the Court would have addressed it and not, instead, relied solely upon a "clear intent" analysis.

Second, what *Myers* makes clear, and what Defendants overlook, is that the repeal rule is a just a variation of discerning legislative intent. The very cases cited by Defendants demonstrate this.[4] In *State of California, Subsequent Injuries Fund v. Industrial Accident Comm'n* (1959) 175 Cal. App. 2d 674, 677, immediately after the court stated the general rule, it immediately looked to the intention of the Legislature to support its application to the case at hand: "[t]hat it was the intention of the Legislature to withdraw the right of employers to obtain contribution from the Fund is made manifest by [the legislative amendment's] language...."

Similarly, in *Governing Board v. Mann* (1977) 18 Cal. 3d 819, the intent of the Legislature to repeal a school district's right to take disciplinary action against a teacher based on an old conviction was also clear and unmistakable from the statutory provision. By its own terms, the statute applied to convictions "occurring prior to January 1, 1976," and there could be no doubt that the Legislature intended to prevent the district from dismissing its employee on the basis of such a conviction. 18 Cal. 3d at 827.

Younger, upon which Defendants also rely, implicitly recognizes this. In stating the repeal rule, the Court quoted its earlier opinions to the effect that the justification for the repeal "'is that all statutory remedies are pursued with full realization that the legislature may abolish the

[4] It is also recognized in treatises. In *California Jurisprudence,* after stating the general rule, it is recognized that its application is subordinate to Legislative intent: "However, the intention of the legislature to save the rights of litigants in pending actions based on a repealed statute may be expressed in a saving clause in the repealing act, or in any act passed at the same session of the legislature. It is not essential that there be an express saving clause or that the intention to save appear in the repealing act itself." *Cal. Jur.* 3d § 83 (citing *Alameda County v. Kuchel* (1948) 32 Cal. 2d 193.)

right to recover at any time.'" 21 Cal.3d at 109 (quoting *Governing Board v. Mann*, 18 Cal.3d at 829; *Callet v. Alioto* (1930) 210 Cal. 65, 67-68). Implicit in this reasoning, necessarily, is an actual intent on the part of the Legislature to abolish the right to recover derived from considered inaction. The same cannot be said of the electorate here.[5]

Indeed, there is otherworldliness to Defendants' position. Boiled down, their position is that because a rule of statutory construction exists in the law, when Proposition 64 passed, the electorate must have known of that rule, and intended it to be applicable to the Proposition. Just as in *Evangelatos* and *Buttram*, they are arguing that, implicitly, the electorate "must have intended [the Proposition] to apply retroactively." *Buttram*, 16 Cal. 4th at 532 (citing *Evangelatos*, 44 Cal. 3d at 1213-14). It is not unreasonable to believe that ballot initiatives should be particularly subject to a clear intent analysis since, unlike legislators, the voting public is obviously not aware of the fine rules and concepts of statutory construction, much less their implied operation and effect. Rather, before another rule of statutory interpretation is implicitly invoked and applied to Proposition 64, the cardinal rule of statutory interpretation must be applied: what was the intent of the electorate?

Thus, just as in *Evangelatos*, before one should "infer a legislative intent on the part of the electorate to apply the measure retroactively," one must consider the electorate's intent. 44 Cal. 3rd at 1194. And because "there is nothing to suggest that the electorate considered the issue of

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[5] Defendants rely on *International Ass'n of Cleaning & Dye House Workers v. Landowitz* (1942) 20 Cal. 2d 418; *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal. App.4th 120, and *Brenton v. Metabolife International, Inc.* (2004) 116 Cal. App.4th 679. In the first instance, none of these decisions concerned a change imposed by ballot initiative. Thus, in each case, the Legislature could fairly be presumed to have knowledge of the consequences of not providing a "savings clause." Indeed, in *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 487-88, on which the court in *Physicians Committee* relied, the legislature had specifically provided that the amendment at issue would expire on a date certain unless subsequent legislature enacted before the expiration date extended or eliminated that date. Second, the legislative change eliminating the ability to assert an early anti-SLAPP motion that was at issue in *Physicians Committee* and *Brenton* was, by those courts' own characterization, procedural in nature. *See Physicians Committee*, 119 Cal. App. 4th at 129 (quoting *Brenton*, 116 Cal. App. 4th at 691) ("the fact that a party acted in an authorized manner at the time he or she invoked the former version of a procedural or remedial statute at trial is no impediment to the appellate court applying the current version of that procedural or remedial statute . . ."). It did not, as the *Brenton* court stated, deprive the plaintiff "of any substantive defense in the action." *Id*. at 690. Accordingly, the legislative changes to the anti-SLAPP procedures, unlike the changes imposed by Proposition 64, had no retrospective effect. *See Brenton*, 116 Cal. App.4th at 689-90.

retroactivity at all" or "to suggest that the electorate intended to cut off a [representative] plaintiff's opportunity" to proceed with a pending litigation on behalf of the general public of California, such an intent should not be implied, particularly where, as here, numerous entities have relied upon the law as it existed prior to November 3. *See id.*, 44 Cal. 3rd at 1194, 1216.

B. Proposition 64 Impacts Antecedent Rights.

Defendants argue that Proposition 64 imposes purely procedural changes and is therefore not subject to the rule against retroactive application of statutes. Proposition 64, however, alters the legal consequences of past conduct in substantive ways. As Judge Cecil concluded, Proposition 64 is not procedural: "The requirement of actual injury for standing goes to the very existence of a cause of action under Bus. & Prof. Code section 17200."

The guiding principle dates back at least to *Aetna Casualty and Surety Co. v. Industrial Accident Com*. (1947) 30 Cal.2d 388. There, the California Supreme Court stated that:

> If substantial changes are made, *even in a statute which might ordinarily be classified as procedural*, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears.

Id. at 394 (emphasis added; citations omitted). This standard has consistently been adhered to. *See*, *e.g.*, *Evangelatos*, *supra*, 44 Cal. 3d at 1205-06; *Tapia*, *supra*, 53 Cal.3d at 290. In *Aetna*, the Court held that a statute that increased compensation for certain injured workers would be deemed retroactive if it were applied to a worker who sustained his injury prior to the effective date of the statute. The amendment "increased the amount of compensation above what was payable at the date of the injury, and to that extent it enlarged the employee's existing rights and the employer's corresponding obligations." *Id.* at 392. The Court concluded, therefore, that the amendment was "substantive in its effect, and its operation would be retroactive, since it imposes a new or additional liability and substantially affects existing rights and obligations." *Id.* at 395.

The Court reached the same conclusion in *Evangelatos*. Supporters of Proposition 51, who like the supporters of Proposition 64 made a strategic decision not to put the issue of retroactivity before the voters, argued that application of the measure to trials conducted after its

effective date would merely be prospective in application. The Court disagreed because "the application of a tort reform statute to a cause of action which arose prior to the effective date of the statute but which is tried after the statute's effective date would constitute a retroactive application of the statute" and such an application of Proposition 51 to pre-existing causes of action "would have a very definite substantive effect on both plaintiffs and defendants who, during the pending litigation, took irreversible actions in reasonable reliance on the then-existing state of the law." 44 Cal.3d at 1206, 1225, fn. 26.

While, as Defendants point out, certain laws are inherently procedural in nature, Proposition 64 cannot be so characterized. This is not a situation where, for instance, the procedural mechanisms in conducting a trial were at issue, as in *Tapia*, 53 Cal. 3d at 286-287 (change in *vior dire* procedure), but rather a change in the law that attaches "new legal consequences to events completed before its enactment." *Accord Twomey*, *supra.*

First, the measure clearly deprives certain individuals and groups who had standing prior to its enactment of the right to pursue their claims, including those who Proposition 64 was purportedly intended to protect. The revocation of standing on the part of non-affected plaintiffs cannot be considered a mere change in procedure. For example, in *Proffitt v. Municipal Auth. of the Borough of Morrisville* (E.D. Pa. 1989) 716 F. Supp. 837, 844, the district court held that a statutory amendment to revoke a private citizen's standing to maintain an action commenced prior to the effective date of the amendment, could not be applied retroactively. Similarly, in *In re Daniel H.* (2002) 99 Cal. App.4th 804, the Court of Appeals refused to give retroactive application to a statute, passed during the pendency of reunification proceedings, that gave parents standing to seek sibling visitation rights for their children. Invoking the familiar rule about legislative intent, the court wrote (*id.* at 812):

> The mother points to nothing indicating that the Legislature intended the new sibling relationship exception to be retroactive, and we can find nothing. Therefore, the mother still lacks standing to raise the sibling visitation issues in this case.

The grant of representational standing determines who may conduct the litigation as or on behalf of the real party in interest. *Without such standing, the plaintiff cannot sue at all.* A rule that is

so outcome determinative as to prevent suit from being filed can hardly be called procedural.

Moreover, due to the availability of non-affected plaintiffs to commence a Section 17200 suit prior to approval of Proposition 64, affected plaintiffs need not have risked the business repercussions of commencing suit in favor of the non-affected plaintiff proceeding. To now apply this measure retroactively would foreclose many of them from now seeking redress under section 17200 because they are now barred by the statute of limitations. Such a concern of prejudice was paramount to the Supreme Court's decision in *Evangelatos*:

> the retroactive application of the measure to preexisting causes of action would frequently have the effect of depriving plaintiffs of any opportunity to recover the proportion of noneconomic damages attributable to absent tortfeasors, because in may cases the statute of limitations on the plaintiff's preexisting cause of action against such an absent tortfeasor will have run before enactment of Proposition 51.

44 Cal.3d at 1215-16.[6]

Second, the class action requirements imposed by Proposition 64 have substantive, not just procedural, effects. For example, while there is no tolling of the statute of limitations in a non-class representative action under Section 17200, *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1102, the filing of a class action serves to toll the statute of limitations. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). And, as noted above, this substantive change serves to bar certain damaged parties from obtaining relief for unlawful or unfair business practices in California, in another respect, it also serves to impose greater liabilities on defendants. In addition, in a class action, a court may order disgorgement into a "fluid recovery" fund, but such a remedy is not available in a non-class Section 17200 action. *Kraus v. Trinity Management Serv., Inc.* (2000, 23 Cal.4th 116, 121-37; *accord Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144-52 (2003). This, too, can adversely and substantively affect defendants in litigation.

Defendants argue that private attorney general actions under Section 17200 are procedural

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[6] Defendants argue, relying on a single decision, that changes to existing standing rules are merely procedural in nature. As defendants themselves concede, in *Parsons v. Tickner* (1995) 31 Cal. App.4th 1513, the Legislature *expanded* the class of persons who could sue. It did not take away any substantive right to sue. This renders the decision inapposite.

citing cases referring to them -- in generalized ways -- as a "streamlined" or "preferable" procedure. The California Supreme Court and appellate courts, however, have been very clear that labels or characterizations are not what governs. Rather, the effect of the statute, as opposed to a rigid characterization of legislation as either procedural or substantive, is a recurring theme in the case law on retroactivity. *See Tapia*, 53 Cal.3d at 289 ("it is law's effect, not its form or label, which is important.") (citing *Aetna*, 30 Cal.2d at 394; *Evangelatos*, 44 Cal.3d at 1225-26, n. 26); *see also Russell*, 185 Cal.App.3d at 816 ("the distinction between 'substantive' and 'procedural' is a misdirection. Both types of statutes may affect past transactions and be governed by the presumption against retroactivity."). Indeed, even seeming changes to procedure have been held to be substantive based upon their effects. *See, e.g., Wertin v. Franchise Tax Bd.* (1998) 68 Cal. App. 4th 961, 978-979 (1998) (statute requiring appeal to State Board of Equalization before filing tax refund suit was substantive, not procedural and could not be applied to pending case).

Likewise, Defendants' contention that Proposition 64 is akin to changes in class action requirements is also without merit. Neither *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462, nor *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal. App.4th 195, 209), considered whether the imposition of class action requirements could have an effect on substantive rights – such as the loss of the right to sue. Moreover, as noted above, under California and Federal law, there are marked differences in, *inter alia*, the running of applicable statutes of limitation in the class and non-class contexts, difference that, in fact, the *Kraus* decision specifically pointed out as being material. *See Kraus*, 21 Cal. 4th at 124-37.

Defendants' suggestion that the import of Proposition 64 is no different than the statutes held to be procedural in effect in *Brenton*, *supra*, and *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal. App. 4th 903, is also wrong. Both cases concerned the enactment of a law eliminating the ability of a defendant to make an anti-SLAPP motion (a special motion to strike where free speech/public rights may be at issue) which permits a court, if certain showings have been made, to dismiss the action at an early stage in the case. *See* 116 Cal. App. 4th at 684. The legislation had no impact on a defendants' ability to assert a defense of "free speech" or "public right" in the action and did not foreclose any claim. Rather, it only advanced consideration of the defense in

the litigation.. *Id*. at 690 ("section 425.17 does not . . . deprive MII of any substantive defense in the action.").

Defendants also rely on *Tapia*. That case likewise falls on other side of the dividing line between substance and procedure. The change to having the Court, rather than counsel, conduct *voir dire* did not deprive either side of the right to have a *voir dire*, just how it would be conducted. As the Supreme Court wrote, "[t]here is no reason to believe that the new voir dire rules will be applied to deprive Tapia's counsel of any information to which voir dire is legitimately directed." *Id*. at 299.

Thus, as even the cases on which Defendants rely make clear, for a statutory change to be considered procedural, it must solely govern a court procedure and must not abridge any substantive right. The same cannot be said about the effect of Proposition 64 which, if applied retroactively, will plainly prevent CLI from pursing this action at all.

CONCLUSION

For all the reasons set forth above, Defendants' motion for judgment on the pleadings should be denied and this action should proceed without further interruption.

Respectfully submitted,

Dated: December 7, 2004

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PROOF OF SERVICE

California Law Institute v. Visa USA, Inc., et al.
San Francisco County Superior Court Case No. CGC-03-421180

I am over the age of 18 years, employed in the county of Marin, and not a party to the within action; my business address is 1050 Northgate Drive, Suite 520, San Rafael, California, 94925.

On December 7, 2004, I served the within:

PLAINTIFF CALIFORNIA LAW INSTITUTE'S MPA IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

on the parties in said action by FACSMILE and US Mail by placing in a sealed envelope, postage prepaid and depositing in a US Mailbox addressed as indicated below:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 7, 2004, at San Rafael, California.

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