No. A107261

COURT OF APPEAL

OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

MONA DUNHAM AND MARY AND BRODY JORDAN,

Appellants,

vs.

MEMBERWORKS, INC.,

Respondent,

OPPOSITION TO MOTION TO DISMISS APPEAL

Appeal from a Judgment of the
Contra Costa Superior Court (No. C03-00522)
The Honorable Barbara Zuniga, Judge

SERVICE UPON ATTORNEY GENERAL REQUIRED BY BUS. & PROF. CODE SECTION 17209

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I. THE COURT SHOULD NOT REACH THE MERITS OF THIS MOTION TO DISMISS

For two reason, the Court should deny this motion to dismiss without reaching the merits of MWI's arguments about Proposition 64. First, dismissal of this appeal would unfairly preclude consideration of plaintiffs' request for remand with leave to amend to add or substitute plaintiffs. A dismissal is proper only where *no* further relief can be granted. Second, as the Second District recently ruled in responding to an identical argument for dismissal in light of Proposition 64, dismissal is improper where the appealing party is aggrieved by the ruling below; instead, arguments such as those made by MWI here, should be raised and decided in the course of ordinary briefing and resolution of the appeal. *United Investors Life Insurance Co. v. Waddell & Reed, Inc.*, 125 Cal.App.4th 1300 (2005).

The Court should therefore deny this motion. MWI will be entitled to raise its Proposition 64 arguments as part of its briefing on the merits of the appeal.

A. Plaintiff Are Entitled To Have The Court Consider Their Request For Leave To Amend. Dismissal Of This Appeal Would Unfairly Deny That Right

This appeal is from a final judgment entered against plaintiffs following MWI's demurrer to the First Amended Complaint. (Joint Appendix [JA] 457, 465.) Therefore, if this appeal is dismissed, as MWI now requests, that judgment will become final for all purposes. *In Re Jasmon O.*, 8 Cal.4th 398, 413 (1994). Such a result would be manifestly unfair because, as demonstrated herein, even if the Court were to conclude that Proposition 64 applies to pending cases such as this one, plaintiffs would be entitled to a remand with directions to the trial court to consider a motion to add or substitute new

parties to meet the new requirements now added to the UCL. Appeals should not be dismissed when a material question remains for determination. *Eye Dog Foundation v. State Board of Guide Dogs for the Blind*, 67 Cal.2d 536, 541 (1967).[1]

Under established law, were this Court ultimately to determine that the new requirements in Proposition 64 apply to this case, then the appropriate course would be to remand with leave to add or substitute new plaintiffs who could meet these newly-imposed requirements.[2]

> When a "court concludes that the named plaintiffs can no longer suitably represent the class, it should at least afford plaintiffs the opportunity to amend their complaint, to redefine the class, or to add new individual plaintiffs, or both, in order to establish a suitable representative." (*La Sala v. American SAV. & Loan Assn.* (1971) 5 Cal.3d 864, 872.)

Tenants Assn. Of Park Santa Anita v. Southers, 222 Cal.App.3d 1293, 1304 (1990) (association found not to have standing to represent members on some claims; leave to amend granted to add members as parties). *See also, Cal. Gas Retailers v. Regal Petroleum Corp.*, 50 Cal.2d 844, 850-851 (1958) (proper to allow amendment to complaint to add new party plaintiff when original pleading was filed by entity not authorized to bring the action in a representative capacity).

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[1] *Cf. County of Fresno v. Shelton*, 66 Cal.App.4th 996, 1005 (1998) (intervening settlement rendered pending appeal moot, but appellate court wished to avoid the result of affirmance of the judgment below, and so reversed the judgment with directions to the trial court to dismiss the action).

[2] Plaintiffs specifically requested this relief in their opening brief on the merits, both in connection with a possible ruling on Proposition 64 (Appellant's Opening Brief at 49-50) and in connection with the trial court's *res judicata* ruling below (*id.* at 42-45).

Since remand for the *addition* of new plaintiffs is appropriate in any event, the Court need not decide whether the existing plaintiffs might successfully amend to comply with the requirements of Proposition 64 (if those requirements are ultimately determined to be applicable to this case). (*See,* JA 183-184 [amended complaint] alleging that each

The leading case is our Supreme Court's decision in *La Sala, supra,* 5 Cal.3d 864. In that case, the Court reversed the trial court's dismissal of a class action where the class representative had obtained all of the relief due them personally, but sought to continue to represent the class of other victims.[3] The trial court concluded that "there is no individual plaintiff remaining who is or could be construed to be a representative of the class", that there was "no justiciable issue" left to be decided, and therefore dismissed the case without prejudice. *Id.* at 870. The Supreme Court reversed, holding that a lack of personal standing by the named representatives did not "mechanically render those plaintiffs unfit *per se* to continue to represent the class." (*Id.*) Instead, the question whether such persons should continue in their role as representatives rested within the discretion of the trial court. *Id.* And, the Court held, should the trial court conclude that those plaintiffs can no longer act as suitable representatives, the trial court must afford the opportunity for the plaintiffs to amend their complaint, including the opportunity "to add new individual plaintiffs". *Id.* at 872.

The parallels between the facts in *La Sala* and the fact herein are striking. As in *La Sala*, the plaintiffs here sought to represent others in challenging practices of the defendant, and as in *La Sala*, the plaintiffs here had standing to do so when the case was

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plaintiff had amounts wrongfully withdrawn from their bank accounts by MWI without authorization, and that – after repeated demands – the amounts charged were refunded).

[3] The class representatives had entered into deeds of trust which contained acceleration provisions that allegedly constituted invalid restraints upon alienation. After plaintiffs filed suit seeking declaratory relief on a classwide basis, the defendant offered to waive its right to enforce the acceleration clause against the named plaintiffs.

initiated, a fact MWI concedes.[4] If, as MWI now contends, Proposition 64 has divested plaintiffs of their ability to continue to represent other victims of its practices, then *La Sala* compels the conclusion that a right to amend the complaint to add or substitute additional plaintiffs to continue the action should be afforded.

The right to remand for leave to add or substitute new plaintiffs has been expressly recognized in each of the decisions finding Proposition 64 retroactive. For example, in *Branick v. Downey Saving & Loan Association,* 126 Cal.App.4th 828, 844-845 (2005) the court cited *La Sala* and other cases, concluding that "[t]hese decisions make clear that substitution of new plaintiffs may be allowed under the circumstances of this case." The court remanded to the trial court for consideration of any request to amend. *Id.* In *Lytwyn v. Fry's Electronics, Inc.,* 126 Cal.App.4th 1455 (2005), the court remanded the case to permit the plaintiff to amend. The court did not expressly address the addition of new plaintiffs because the existing plaintiff already stated several valid causes of action and, it appeared, might successfully amend to state others. (*Id.*) The court expressly authorized remand for the addition of class certification allegations as a result of Proposition 64's new requirements to that effect. (*Id.*) In *Bivens v. Corel Corp.,* 126 Cal.App.4th 1392 (2005), the court recognized the right to amend the complaint to substitute in a new plaintiff with standing, but decided against remand because its review of the case persuaded it that any new plaintiff would be similarly subject to summary judgment, so remand would be futuile. 2005 Cal.App. LEXIS 267 at n. 5 and n. 6.

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[4] *See, e.g.,* Motion to Dismiss at 41 ("Appellants *had* standing to assert a UCL claim on behalf of the general public at the time of the superior court's order and judgment").

Finally, in *Benson v. Quickset Corp.*, 126 Cal.App.4th 887 (2005), as in *Bivens, supra,* the court *would have* authorized the substitution of a new plaintiff on remand if a viable cause of action could have been stated by such a plaintiff. However, under the facts therein, the court concluded that the statute of limitations had run on any such claim (because the wrongful activities had ceased long before). The court concluded that the claims of a substitute plaintiff would not relate back to the initial filing of the case. (*Id.*)[5]

In summary, MWI's motion to dismiss should be denied because grant of the motion would unfairly deny plaintiffs the right to amend their complaint on remand.

B. Because Plaintiffs Were Aggrieved By The Judgment Below, This Appeal Is Proper And MWI's Motion To Dismiss It Is Misdirected

MWI's argument regarding Proposition 64 is, in essence, merely an alternative ground upon which MWI urges affirmance of the trial court's judgment below. If Proposition 64 had been enacted *prior* to entry of the judgment below, no one could suggest that plaintiffs' appeal should be dismissed on that ground, whether or not the trial court rested its judgment on that enactment. The fact that Proposition 64 was enacted *after* judgment was entered below can support no different result. Plaintiffs are appealing from an adverse judgment below. MWI is free to attempt to defend that judgment on its merits. In addition, MWI is free to argue that Proposition 64's enactment is an alternative ground for affirmance. However, MWI is not entitled to have this appeal

[5] Since MWI's activities here, unlike those before the court in *Benson*, are alleged to be continuing (JA 181, 186-189), this Court need not address the question whether the claims of a new plaintiff in this case would relate back to the date of initial filing or not. Nevertheless, it should be noted that the conclusion of the court in *Benson* appears contrary to the Supreme Court's discussion in *La Sala, supra,* as well as other appellate

dismissed as if it had not been properly brought by an aggrieved party or was not taken from an appealable order.[6]

This exact conclusion was reached in the recent case of *United Investors Life Insurance Co., supra,* 125 Cal.App.4th 1300 (2005). In that case, the court denied an identical motion to dismiss based upon enactment of Proposition 64. The court declined to reach the merits of the motion to dismiss, finding that the movants' argument was directed to the question whether the appellant had standing *in the superior court* to proceed with its case, and that such an argument was not a proper basis for seeking dismissal of an appeal. 125 Cal.App.4th at 1304. The court noted that the question of standing in the appellate courts is distinct from the question of standing at the trial court level. Appellate standing focuses on the question whether the party appealing has been "aggrieved" by the trial court judgment. Noting that the right to appeal is liberally construed and that Proposition 64 contains no indication whatsoever that it was intended to affect appellate court jurisdiction, as opposed to trial court jurisdiction, the court concluded:

> Pursuant to Code of Civil Procedure § 902, we conclude plaintiff has standing to appeal. Plaintiff is a party. Plaintiff is aggrieved because its complaint has been dismissed. Even if plaintiff has no authority to maintain its suit in superior court, it is sufficiently aggrieved by the dismissal of its complaint that it has standing to appeal under Code of Civil Procedure § 902.

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decisions such as *Jensen v. Royal Pools,* 48 Cal.App.3d 717, 721 (1975). Plaintiffs believe that *Benson* was wrongly decided on this point.

[6] MWI urges the Court to follow federal case law governing standing in the federal courts under Article III of the United States Constitution. (Motion to Dismiss at 10-12.) However, "Article III" jurisprudence is not applicable in California. *National Paint & Coatings Association v. State of California,* 58 Cal.App.4th 753, 761 (1997) ("Appellants cite no California cases holding that concrete injury and redressability are essential prerequisites to justiciability in California . . .").

Id. at 1305 (citations omitted).

MWI acknowledges the on-point decision in *United Investors,* but argues that this court should not follow it. First, MWI incorrectly asserts that *United Investors* "relied almost exclusively" on *In Re Catherine H.*, 102 Cal.App.4th 1284 (2002) – a decision which MWI attempts to distinguish. (Motion to Dismiss at 40 – 41.) To the contrary, however, the court in *United Investors* independently analyzed the question of appellate standing, noted the requirements and found them all present in that case. They are equally present in this one. Thus, even if *In Re Catherine H.* were inapposite, that would be no reason not to follow *United Investors*.[7]

Second, MWI argues that the facts in *In Re Catherine H.* make it distinguishable from the facts in *United Investors* and in the instant case. As noted above, MWI is incorrect in asserting that the court in *United Investors* simply slavishly followed *In Re Catherine H.* In any event, MWI's attempt to distinguish the latter decision is unpersuasive. While it is true that the trial court judgment in *In Re Catherine H.* involved trial court standing while the underlying judgment here was based on a *res judicata* finding, that difference is irrelevant to the question of appellate jurisdiction (the point for which *United Investors* cited the case). The fact remains that MWI is free to present its Proposition 64 arguments in its brief on the merits and that is the proper place for it to do so.

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[7] The *United Investors* court cited *In Re Catherine H.* as additional support for its conclusion that "an appellate court has *jurisdiction* to determine whether a party has standing in superior court to pursue a cause of action." (125 Cal.App.4th at 1305 (emphasis in original)). If appellate jurisdiction exists, then a motion to dismiss is

Finally, MWI argues that the mootness doctrine could support dismissal of the appeal even if the standing doctrine does not. (Motion to Dismiss at 41 – 42.) But divorced from its standing arguments, MWI's mootness claim equates to the contention that an appeal is moot whenever it would ultimately result in affirmance. In other words, if Proposition 64 does not divest plaintiffs of appellate standing (which it does not), then its only relevance is as a potential alternative ground for affirming the judgment. The existence of such a potential ground certainly does not render the case moot, nor does it provide MWI with any right to pre-emptively argue the merits of this appeal.

In any event, mootness supports dismissal of an appeal only where it is impossible for the appellate court to grant the appellant *any* effective relief. *See, Eye Dog Foundation, supra* at 541. Here, as demonstrated above, regardless of the applicability of Proposition 64 to this case, plaintiffs will at least be entitled to remand with instructions to the trial court to consider any request for leave to amend.

II. SHOULD THE COURT REACH THE ISSUE, IT SHOULD CONCLUDE THAT PROPOSITION 64 DOES NOT APPLY TO PENDING CASES

As demonstrated above, the arguments raised by MWI are essentially arguments for "affirmance on other grounds" and are properly addressed by this Court in resolving this appeal on its merits. However, should the Court determine that it is appropriate to reach the substance of MWI's Motion to Dismiss, then it should conclude that Proposition 64 does not apply to pending cases such as this one and deny this motion.

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inappropriate. Instead, the arguments against continued litigation should be presented in the merits briefing.

MWI argues that Proposition 64 should apply to pending cases on three grounds: First, MWI argues that the "statutory repeal" doctrine should be followed here (Motion at 13-21); second, MWI argues that purely procedural changes were enacted in Proposition 64 (pp. 21-32); and third, MWI argues that the text of Proposition 64 unambiguously states its intent to apply to pending cases (pp. 32-36). Plaintiffs address the latter two arguments first, as they are easily disposed of. We then turn to the "statutory repeal" issue which requires a more in-depth analysis.

A. Because There Is No Clear And Unambiguous Evidence That Proposition 64 Was Intended To Apply Retroactively, It Is Prospective Only

Statutes are presumed to operate only prospectively "absent some clear indication that the Legislature intended otherwise." *Tapia v. Superior Court*, 53 Cal.3d 282, 287 (1991); *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1207 (1988). Objective indication of legislative intent is the crucial question, and it must be clear and unambiguous before a newly-enacted law will be applied to pending cases. "It 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.'" *McClung v. Employment Development Dept.*, 34 Cal.4th 467, 475 (2004) (quoting *United States v. Heth*, 7 U.S. 399, 413 (1806). There is a "strong presumption" that the Legislature does not intend to make retroactive changes to the law. *Id.*

This strong presumption against retroactivity applies fully in the context of a voter-enacted proposition. In *Evangelatos, supra*, the Supreme Court addressed the

question whether the tort reform measures enacted in Proposition 51 should be applied retroactively or only prospectively. The Court approvingly quoted United States Supreme Court Chief Justice Rehnquist's comment that "every law student" is familiar with the principle that "statutes operate only prospectively, while judicial decisions operate retrospectively." 44 Cal.3d at 1206-1207 (quoting *United States v. Security Industrial Bank*, 459 U.S. 70, 79-80 (1982)). While acknowledging that its past decisions had not always been consistent, the Court declined to follow the dissent's approach – which emphasized an assessment of overall purpose and whether or not the statute was "remedial in nature" – instead adhering to the rule that retroactive effect is never to be presumed, and will be found only if express statement of intention appears in the record. *Id.* at 1208-1215. Rejecting attempts "to stretch the language of isolated portions of the statute to support the position each [party] favors", the Court concluded that a fair reading of the Proposition indicated that the subject of retroactivity or prospectivity was simply not addressed. *Id.* at 1209. The Court concluded:

> Since the drafters declined to insert such a provision in the proposition – perhaps in order to avoid the adverse political consequences that might have flowed from the inclusion of such a provision – it would appear improper for this court to read a retroactivity clause into the enactment at this juncture.

Id. at 1212.

A reading of the language of Proposition 64 demonstrates that, as in the case of Proposition 51, the drafters omitted any reference to retroactivity or prospectivity. Whatever implications might be argued from the parsing of a word here or there, it is indisputable that there is nothing in either the proposition itself or the ballot language and

arguments which were presented to the electorate which could conceivably constitute a "clear indication" that the proposition was intended to apply retroactively. *Tapia, supra.* Therefore, the newly-enacted amendments to the UCL do not apply to pending cases such as this one.

MWI urges this Court to conclude from Proposition 64's use of "pursue" and "prosecute", rather than "initiate" that the Proposition was intended to apply to pending cases. (Motion to Dismiss at 32-35.) But such parsing of words is precisely the approach squarely rejected by the Supreme Court in *Evangelatos*. 44 Cal.3d at 1209. The task of a court in this context is *not* simply to construe the statute, piecing together hints of legislative intent where available. Instead, statutes are found to be retroactive only if it be "the unequivocal and inflexible import of the terms". *McClung, supra,* 34 Cal.4th at 475. MWI's arguments fall far short of such a showing. In truth, as Division Four concluded in *Californians for Disability Rights v. Mervyn's, LLC,* 126 Cal.App.4th 386, 392-393 (2005) ("*Mervyn's*"), the only fair conclusion that can be drawn from the wording of the proposition and its associated ballet pamphlet is that the question of retroactivity was not presented to, nor considered by, the electorate.[8]

[8] In any event, as noted in *Mervyn's*, even if it were appropriate to read the tea leaves, the indications are mixed. The "Findings And Declarations Of Purpose" portion of Proposition 64, as well as the ballot arguments, refer to the "filing" of lawsuits (*id.*), a word directly inconsistent with MWI's construction. Moreover, words like "prosecute" have multiple meanings in common parlance and do not support a finding of intention one way or the other. For example, The American Heritage Dictionary Of The English Language provides multiple definitions for the word "prosecute", with the first listed definition as "to *initiate* civil or criminal court action against." (4th Edition 2000, definitions 1(a) [emphasis added].)

B. Application of Proposition 65 To This Case Would Affect Plaintiffs' Substantive Rights, And Would Not Be Purely "Procedural Or Evidentiary"

Where an intervening statutory enactment involves purely procedural or evidentiary matters, the changes may, in some circumstances, be applied to pending cases without contradicting the "no retroactivity" rule. As the Supreme Court most recently put it:

> New statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise. [Citations] However, this rule does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even though such trials may involve the evaluation of civil or criminal conduct occurring before enactment. (*Tapia,* at pp. 288-289.) . . . 'The effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future.' [Citations.] For this reason, we have said that 'it is a misnomer to designate [such statutes] as having retrospective effect.'" (*Id.* at p. 288.)

Elsner v. Uveges, 34 Cal.4th 915, 936 (2004).

Application of Proposition 64 to this case would not fall within this *proviso* to the general rule. In determining whether a statutory change is purely "procedural or evidentiary", the court is to "look to function, not form." (*Id.*) If the change would "substantially affect existing rights and obligations", then "application to a trial of preenactment conduct is forbidden, absent an express legislative intent to permit such retroactive application." (*Id.*)

As one court described it, the presumption against retroactivity applies equally to either "procedural" or "substantive" statutes.

> Both types of statutes may affect past transactions and be governed by the presumption against retroactivity. The only exception we can discern from the cases is a subcategory of procedural statutes which can have no effect on substantive rights and liabilities, but which affect only modes of procedure to be followed in future proceedings. As *Aetna* pointed out, such statutes are not governed by the

> retroactivity presumption but not because they are "procedural", but simply because they are not in fact retroactive.

Russell v. Superior Court, 185 Cal.App.3d 810, 816 (1986).

Here, application of Proposition 64 would clearly "affect [plaintiffs'] existing rights". If Proposition 64's amendments to the UCL are *not* applied to this case, then plaintiffs may proceed forward to seek injunctive relief and restitution on behalf of the general public (assuming an otherwise meritorious appeal). If Proposition 64's amendments *do* apply to this case, then plaintiffs presumably are barred from proceeding. In other words, resolution of this question determines whether or not plaintiffs have a case at all. Obviously, such a determination affects plaintiffs' existing rights. Elimination of plaintiffs' cause of action cannot be characterized as merely a change "governing the conduct of trials" or the like. *See, Tapia, supra*, 53 Cal.3d at 289.[9]

MWI attempts to erect a "procedural" versus "substantive" dichotomy and urges this Court to place the removal of plaintiffs' standing into the "procedural" basket. (Motion to Dismiss at 21-32.) However, whatever the value of such categorization in other contexts (*see, e.g.*, Motion to Dismiss at 26), it is not the correct approach here, as our Supreme Court has repeatedly noted. In response to a similar argument in *Aetna Casualty & Surety Co. v. Industrial Accident Commission*, 30 Cal.2d 388 (1947), the Court stated:

> This reasoning, however, assumes a clear-cut distinction between purely "procedural" and purely "substantive" legislation. In truth, the distinction relates not so much to the form of the statute as to its

[9] In *Morris v. Pacific Electric Railway Co.*, 2 Cal.2d 764 (1935), the Supreme Court rejected the notion that a legislative shift in the burden of proof was purely procedural or evidentiary where it effectively altered the standard of care applicable to the case. *Id.* at 768-769.

> effect. 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.

30 Cal.2d at 394-395. The Court has repeated this concept on numerous occasions. *See, e.g., Tapia, supra,* 53 Cal.3d at 289 ("in deciding whether the application of a law is prospective or retroactive, we look to function, not form."); *Elsner, supra,* 34 Cal.4th at 926 ("we consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies.").

The relevant question is whether the applicable change in the law affects substantive rights of a party, not whether the change can be labeled "procedural". As noted above, the alterations to the standing rules under the UCL adopted in Proposition 64 not only "affect" plaintiffs' rights in this lawsuit, they substantially eviscerate them.[10] This question was addressed by the United States Supreme Court in *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939 (1997), which was cited approvingly by our State Supreme Court in *Tapia, supra,* 53 Cal.3d at 840-841. In *Hughes,* the U.S. Supreme Court distinguished between two different kinds of "jurisdictional" statutes, those determining which court shall have jurisdiction to entertain a claim and those which determine whether a claim may be brought:

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[10] MWI addresses both the portion of Proposition 64 which altered the standing provisions of the UCL and the portion referring to the class action provisions of CCP § 382. (Motion to Dismiss at 21, 26, 27 and 31.) However, this Motion to Dismiss does not properly raise the issue whether the new requirements pertaining to § 382 should be applied in this case. Assuming *arguendo* that that portion of Proposition 64 should be applied, that would provide no basis whatsoever for dismissing this appeal. Rather, it would be a matter germane to remand following decision on the merits of the appeal.

> Such statutes [addressing which court shall have jurisdiction to entertain a particular cause of action] affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among fora. Rather, it *creates* jurisdiction where none previously existed: It thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

520 U.S. at 951 (emphasis in original).

C. Proposition 64's Standing Requirements Should Not Be Applied To Pending Cases Under The So-Called "Statutory Repeal" Doctrine

MWI's principal argument is that the historical doctrine of "statutory repeal" should be applied here. (Motion to Dismiss at 13-21.) The three appellate divisions which have concluded that Proposition 64 should apply to pending cases have done so in reliance on this doctrine. *See, Lytwyn, supra,* 126 Cal.App.4th 1455; *Bivens, supra,* 126 Cal.App.4th 1392; *Benson, supra,* 126 Cal.App.4th at 901-905; *Branick v. Downey Savings & Loan Association, supra,* 126 Cal.App.4th at 840-844.

However, Division Four of this Court criticized the doctrine and concluded that it did not apply in the Proposition 64 context in *Mervyn's, supra,* 126 Cal.App.4th at 394-396. The *Mervyn's* court noted the many California and United States Supreme Court decisions holding that a presumption of prospectivity is the controlling principle and concluded that the best resolution of the "seeming conflict in cannons of statutory interpretation" (126 Cal.App.4th at 395) is to understand the "statutory repeal" doctrine as evidencing those courts' conclusion that the circumstances before them indicated legislative intent for retrospective application. (*Id.*) While it did not explicitly say so, the *Mervyn* court's implicit conclusion was that any other interpretation of the "statutory

repeal" line of cases would result in their invalidity under current Supreme Court decisions such as *Evangelatos, supra.* (*Id.* at 395-396.) For the reasons that follow, this Court should follow *Mervyn's*.

The principal enunciation of the statutory repeal concept appears in two Supreme Court cases from the "substantive due process" era, *Callet v. Alioto,* 210 Cal. 65 (1930) and *Southern Services Co. v. Los Angeles County,* 15 Cal.2d 1 (1940). Neither of these decisions (nor the doctrine they describe) have been cited or relied upon by any Supreme Court decision in the last 25 years, despite the fact that that Court has addressed retroactivity questions numerous times over that period. The inevitable conclusion is that the doctrine, at least as articulated in the broad form appearing in *Callet* and *Southern Services*, does not reflect the Court's current view of the law.

Since 1986, our state Supreme Court has issued ten decisions addressing the question whether newly-enacted statutes (or propositions) should be applied in pending cases. In each case, the Court has unwaveringly adhered to a clear test for determining the question: Absent clear evidence of legislative intent otherwise, new enactments apply prospectively only. *Elsner, supra,* 34 Cal.4th at 544 ("New statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise"); *McClung v. Employment Development Department,* 34 Cal.4th 467, 475 (2004) ("[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" [quoting *United States v. Heth* (1806) 7 U.S. 399]); *Myers v. Philip Morris Companies, Inc.*, 28 Cal.4th 828, 841

(2002) ("California courts comply with the legal principle that unless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application'" [emphasis in original, citations omitted]); *Western Security Bank v. Superior Court*, 15 Cal.4th 232, 243 (1997) ("A basic cannon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so."); *Droeger v. Friedman, Sloan & Ross,* 54 Cal.3d 26, 42-43 (1991) (Amendment to Code of Civil Procedure not retroactive absent explicit language so indicating); *Tapia, supra,* 53 Cal.3d at 287 ("It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise."); *People v. Hayes,* 49 Cal.3d 1260, 1274 (1989) ("A new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling indication that the Legislature intended otherwise"); *Evangelatos, supra,* 44 Cal.3d at 1208-1209 (1988) ("California continues to adhere to the time-honored principle codified by the Legislature in Civil Code Section 3 and similar provisions, that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application."); *Cole v. Fair Oaks Fire Protection District,* 43 Cal.3d 148, 153 (1987) ("'It is an established cannon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.'" [quoting *Aetna Casualty & Surety Co., supra,* 30 Cal.2d at 393]); *Hoffman v. Board of*

Retirement, 42 Cal.3d 590, 593 (1986) ("We will not give retroactive effect to a statute affecting a substantive right unless the Legislature expressly and clearly declares its intent that the statute operate retroactively.").

In none of those decisions is there any statement, or even a hint, that the Court recognizes the huge exception to the rule of presumptive prospectivity represented by the historical "statutory repeal" doctrine, *i.e.*, that amendments to statutorily-created rights are presumed *retroactive*, not prospective. To the contrary, in each of these decisions, the Court has flatly stated the rule favoring prospectivity without admitting of any such exception.[11] And the Court's decisions have consistently stated this rule with regard to "all statutes" or simply "statutes", not just "those statutes which affect only common law rights or remedies." These decisions, some of which we discuss in more detail below, make clear that the Court has effectively repudiated the "statutory repeal" doctrine.[12]

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[11] The decisions *do* recognize circumstances where application of new laws to pending cases is actually prospective, not retrospective, and hence is not contrary to the rule against retroactivity. As discussed above, certain purely procedural or evidentiary issues are "prospective" when applied to future judicial proceedings, even if the underlying cause of action arose prior to enactment. *See, e.g., Elsner, supra,* 34 Cal.4th at 544. Similarly, where new statutes merely clarify pre-existing law, application of the new statutes has no retroactive effect. *Hoffman, supra*, 42 Cal.3d at 593.

[12] It is, of course, not the province of this Court to overrule decisions of the California Supreme Court. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962). However, where multiple decisions of a higher court conflict with each other, the lower court must choose among those decisions. *Id.* at 456. Moreover, where the governing legal principles have changed, an appellate court need not follow older Supreme Court decisions predicated on the previous law. *People v. Farr*, 255 Cal.App.2d 679, 688 (1967) (declining to follow Supreme Court decision rejecting certain evidence as "no longer valid", in light of "more elastic standards of § 1252 [of the Evidence Code]").

It is impossible to completely reconcile all of the Court's older decisions on the question of retroactivity.[13] However, at least since the Court's decision in *Evangelatos*, it is abundantly clear that an explicit statement of legislative intent is the critical issue in the analysis and that an intent of retroactivity will never be presumed. 44 Cal.3d at 1205-1225. In reaching its result, the *Evangelatos* court modified, limited or "explained" numerous previous decisions cited by the dissent in which the Court had not strictly adhered to the presumption against retroactivity. As to each line of cases, the Court announced that the presumption trumped all other considerations. (*Id.* at 1208-1209, 1210-1211 and n. 15, 1213, 1222-1224.)

Critically, in affirming the primacy of the need for a clear statement of legislative intent before finding retroactive application appropriate, the court in *Evangelatos* repeatedly stressed that its conclusion was mandated by the Legislature itself. The Court noted that Section 3 of the Civil Code provides that "[n]o part of [this code] is retroactive, unless expressly so declared." 44 Cal.3d at 1207. *See also, id.* at 1193, 1208-1209, 1213, 1222, 1223 and 1127. Therefore, as the Court repeatedly noted, whatever arguments exist for presuming a legislative intent of retroactivity in any

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[13] *Compare, e.g., Oakland v. Whipple*, 44 Cal.303 (1872) (plaintiff's action to recover past taxes may be maintained even though statute authorizing such actions was repealed; refusing to infer retroactivity) *and Wells Fargo & Co. v. City and County of San Francisco*, 25 Cal.2d 37, 41 (1944) (taypayer's action to recover taxes paid under protest not subject to time limitations enacted after he filed suit, because "a statute cannot cut off a right of action without allowing a reasonable time after its effective date for the exercise of the right") *with Southern Service Co. v. Los Angeles*, 15 Cal.2d 1 (1940) (taxpayer's action to recover wrongfully-paid taxes may not continue after enabling statute repealed; Legislature's intent of retroactivity presumed in the absence of savings clause).

particular category of cases, such arguments are simply irrelevant. The Court *may not* find that a statute is retroactive unless "expressly" so declared by the Legislature. [14]

That conclusion applies fully to Proposition 64 and the present case for two reasons. First, though the Business & Professions Code does not contain an identical provision to Civil Code Section 3, the Supreme Court has previously held that the exact same rule regarding retroactive application apply to statutes in *all* of the codes whether or not they happen to contain that provision. *DiGenova v. State Board of Education*, 57 Cal.2d 167, 172-173 (1962):

> It is specifically provided in three of our basic codes that no part thereof is retroactive "unless expressly so declared." (Civ. Code, § 3; Code Civ. Proc., § 3; Pen. Code, § 3.) . . . [¶] Accordingly, where language used by the Legislature has not clearly shown that retroactive application was intended, the rule against retroactive construction has uniformly been held applicable to codes or acts not containing the provision not set forth in the Civil Code, the Code of Civil Procedure, and the Penal Code. . . . [¶] It is thus clear that the absence of the statutory provision from other codes and statutes . . . does not indicate that with respect to those enactments the

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[14] Support for the "statutory repeal" doctrine is sometimes suggested to arise from Government Code § 9606, which states: "Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal." *See,* Motion to Dismiss at 15 (and cases cited therein).

However, upon closer examination, this claim of support is groundless. The clear meaning of this provision is simply that statutes do not create vested rights and that the Legislature retains the *power* to repeal any statute unless constitutional restraints exist – an issue not in question here. *See also,* n. 17, *infra*. That the Legislature has the *power* to retroactively erase previous rights says nothing about whether the Legislature *intended* to do so. *Mervyn's, supra,* at 395-396. The provision thus provides absolutely no support for the concept, apparently embodied in the "statutory repeal" doctrine, that the Legislature should be *presumed* to intend retroactivity when repealing a "statutory right".

Indeed, the interpretation placed upon § 9606 by those decisions upholding the "statutory repeal" doctrine conflicts with the much more directly on-point provisions stating that no part of the codes is retroactive unless expressly so declared. *See, e.g.,* Civil Code Section 3. As already discussed *supra,* our Supreme Court has clearly stated that the "no retroactivity presumed" rule governs.

In any event, even as to the issue of "vested rights," to which the provision is clearly directed, the distinction between "statutory rights" and "common law rights" no longer reflects the law of this State, as discussed in the text *infra*.

> Legislature has rejected the rule against a retroactive construction or that some different rule is applicable. *The rule to be applied is the same with respect to all statutes, and none of them is retroactive unless the Legislature has expressly so declared.*

Id. (emphasis added).

Second, though the provisions of the UCL now appear in the Business & Professions Code, this was the result of a relatively recent recodification. In 1977, the provisions of the UCL (including its broad standing provisions) were moved, unchanged, from Civil Code §§ 3369 *et seq.* to their present location at Business & Professions Code § 17200 *et seq.* Any argument that the presumption against retroactivity changed as a result of this re-codification would be absurd. [15]

Put simply, the decision in *Evangelatos*, including its emphasis on the provisions of Civil Code § 3 and its equivalent implementation to all other codes, leaves no room for the "statutory repeal" argument made by MWI here. Whatever prior conclusions the Court did or did not come to in previous cases, the clear requirement of an unequivocal statement of intent is now required before finding retroactive application of a statute appropriate. This rule applies to *every* statute in every circumstance without exception. The failure to recognize this salient point undermines the conclusions of the Second and Fourth Districts, which found *Evangelatos* to be essentially irrelevant because its facts did not involve a statutory right. *See, e.g., Bivens, supra.*

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[15] The legislative directive that statutory provisions are not retroactive unless clearly stated otherwise, applies fully to amendments to the original provisions (such as those amendments enacted by Proposition 64) and not just to the original provisions themselves. *Evangelatos*, 44 Cal.3d at 1207 n. 11 (disapproving a contrary Court of Appeal decision on this point).

The "statutory repeal" doctrine was based upon a perceived distinction between statutory and common law rights which – if ever of historical validity – has long since lost any importance outside of those few areas – such as right to jury trial – where our Constitution froze rights as of the date of the Constitution's adoption.[16] In other contexts, such as the question of retroactivity addressed here, the distinction between "statutory" and "common law" causes of action is arbitrary and without logical foundation. Whether a particular cause of action had an historical common law counterpart prior to the 1872 adoption of the "Field Codes" has become completely irrelevant in contexts such as this one. Indeed, even the role that the distinction between common law and statutory rights once played in deciding whether a cause of action was "vested" has been repudiated and abandoned. In *Flournoy v. State,* 230 Cal.App.2d 520, 532 (1964), the court noted the "rickety reasoning" underlying the line of cases drawing this distinction, including the leading case on the so called "statutory repeal" doctrine, *Callet v. Alioto, supra.*

> But resting decision upon the distinction between statutory and common law rights is neither justified by reason nor rule. The distinction is based upon rickety reasoning because persons act no more nor less in reliance upon established rules of the common law, or in expectations that they will remain unchanged, than they do upon statutes.

Id. at 532. Instead, the *Flournoy* decision announced a balancing test for deciding whether rights are or are not "vested," which involved a review of all relevant circumstances. One year later, our Supreme Court cited *Flournoy* and explicitly adopted its conclusions:

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[16] *See, e.g., Crouchman v. Superior Court*, 45 Cal.3d 1167, 1175-1177 (1988) ("our state Constitution essentially *preserves* the right to a jury in those actions in which there was a right to a jury trial at common law at the time the Constitution was first adopted").

> [The plaintiff] contends that although the Legislature can retroactively abrogate rights provided by statute, it cannot retroactively change the common law to abrogate a "vested right." (*See Callet v. Alioto*, 210 Cal. 65.) We find no constitutional basis for distinguishing statutory from common law rights merely because of their origin (*see* 5 Cal. Law Revision Com. Rep. 526), and describing a right as "vested" is merely conclusory.

County of Los Angeles v. Superior Court of Los Angeles County, 62 Cal.2d 839, 844-845 (1965).[17]

That the Supreme Court no longer follows the old "statutory repeal" doctrine as it is now being argued by MWI is evidenced by several recent cases in which the Court failed even to acknowledge the doctrine's existence in reaching its result. For example, in *Myers, supra,* the Supreme Court addressed the question whether the Legislature's repeal of the so-called Immunity Statute (immunizing tobacco companies from certain

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[17] The report of the California Law Revision Commission cited by the Supreme Court stated as follows:

> The distinction adverted to in the *Callet* case, between statutory causes of action and common law causes of action, seems exceedingly formal. Manifestly, if a person can be deemed to pursue a statutory right in contemplation of possible repeal of the statute, by the same token he may be taken to pursue any common law right in contemplation of a possible abrogation of that right by legislation. In any event, even the statutory foundation for the court's position that statutory rights are distinguishable from common law rights does not support the distinction. Section 9606 of the Government Code expressly declares that:
>
> > Any statute may be repealed at any time, *except when vested rights would be impaired.* Persons acting under any statute act in contemplation of *this* power of repeal. [Emphasis added.]
>
> Taken at face value, this provision simply means that persons acting in pursuit of statutory rights act in contemplation of the fact that the Legislature has power to repeal the statute provided it does not thereby destroy any rights which have become "vested." To rely upon this section as a basis for the distinction noted in *Callet* is surely specious since it really begs the question as to what are the identifying characteristics of a "vested" right.

claims) was retroactive. Despite the fact that the immunity formerly provided was solely a creature of statute rather than a common law right (28 Cal.4th at 844), the Court applied the presumption against retroactivity, as it has in every other recent case.

Similarly, in *Hoffman v. Board of Retirement, supra,* the plaintiff, a disabled employee, sought disability payments but was denied them by the administrative board. She appealed the denial, and while her appeal was pending, the Legislature amended Government Code § 31720 to add an additional requirement to be proven before disability payments became payable. The defendant argued that the new version of the statute should govern, even though plaintiff's disability and her application for benefits occurred prior to enactment. The Supreme Court analyzed the case by citing the presumption that all statutes operate prospectively only, absent clear expression otherwise; the Court never mentioned the "statutory repeal" line of cases, despite the fact that the plaintiff's claimed right to benefits was purely statutory. 42 Cal.3d at 593. [18]

The same point can be made about *Balen v. Peralta Junior College District,* 11 Cal.3d 821 (1974). In that case, the plaintiff was a college instructor who qualified under the relevant statute as a "probationary" employee entitled to notice prior to termination. The statute was then amended to classify part time instructors such as plaintiff as "temporary" employees not entitled to any notice prior to termination. The plaintiff was thereafter terminated and he sued claiming lack of notice and a hearing. Even though the initial classification as "probationary" was a right given to plaintiff solely by statute, the

[18] Ultimately, the Court concluded that the amendment at issue was merely a clarification of existing law, and hence that immediate application of the amendment was not retrospective in nature. (*Id.* at 593.)

Court addressed the retroactivity question through application of the general presumption against it. Once again, the Court made absolutely no mention of the "statutory repeal" doctrine. Indeed, the Court stated to the contrary:

> Application of a statute to destroy interests which matured prior to its enactment is generally disfavored. (2 Sutherland, Statutory Construction [4th ed. 1973] §4104.) Absent specific legislative provision for retroactivity or other indication of legislative intent, it would manifestly be unjust to interpret the new statute in a manner that would strip petitioner of his previously acquired status."

Id. at 830.[19]

The "statutory repeal" doctrine was last acknowledged by the Supreme Court in 1977 and 1978 in *Governing Board v. Mann*, 18 Cal.3d 819, 829 (1977) and *Younger v. Superior Court*, 21 Cal.3d 102, 109 (1978). These decisions preceded *Evangelatos* by ten years, and whatever life they may have temporarily breathed into that doctrine, they have not stood the test of time. Both cases dealt with the impact of past convictions for possession of minor amounts of marijuana and reflect the Court's concerns stemming from the uniquely dramatic change in public policies dealing with such convictions. [20]

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[19] The Court immediately thereafter noted that it need not reach the issue whether plaintiff had any "vested" rights. Rather, the Court's decision was purely one of statutory interpretation. *Id.* at n. 9.

[20] The Court described the background facts in *Governing Board v. Mann* as follows:

> Mann and a roommate shared a house. The party had apparently been arranged by Mann's roommate without Mann's knowledge; Mann and a friend arrived at the residence on the evening on question to find the party in progress. The trial court specifically found that the marijuana which was used by the other participants in the party did not belong to defendant. [¶] The small amount of marijuana which defendant possessed was found in a filing cabinet in his bedroom when the police conducted a general search of the entire premises. This general search did not result in the suppression of the evidence against defendant only because the search preceded the United States Supreme Court decision in *Chimel v. California* (1969) 395 U.S. 752.

18 Cal.3d at 823 n. 1.

Neither decision's retroactivity rulings have been cited by the Court for over 25 years, despite the fact that the Court has issued ten retroactivity decisions over that period. In any event, both decisions are best explained by their particular facts. In *Governing Board v. Mann*, the issue before the Court was whether a school teacher could rely on recent legislation precluding termination for past marijuana convictions even though the law in effect at the time of his termination required his firing. The Court relied primarily on a line of cases holding that legislative reductions in the magnitude of government-imposed penalties should be applied immediately to give the defendant the benefit of the mitigated punishment. 18 Cal.3d at 829-830.[21]

Younger, *supra*, involved the question of which entity had jurisdiction to expunge records of past criminal convictions for marijuana possession. Prior legislation had placed that authority in the superior court, but a recent amendment reassigned the authority to the Department of Justice. The Court noted that the question before it was one of jurisdiction *i.e.*, whether the superior court still had authority to expunge the records at issue. 21 Cal.3d at 110. The Court concluded that it did not. In doing so, the

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> The court concluded its opinion as follows: In recent years, prevailing societal views as to the appropriate treatment of marijuana offenders have undergone considerable revision. Through legislation enacted in 1975 and 1976, the California Legislature has determined that at the present time public policy is best served by prohibiting public entities from imposing adverse collateral sanctions on individuals who, some years ago, may have suffered a conviction for possession of marijuana.

Id. at 831.

[21] The Court cited *In Re Estrada*, 63 Cal.2d 740 (1965). That case was also discussed ten years later in *Evangelatos* and explained: "To hold otherwise would be to conclude that the legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." 44 Cal.3d at 1210 (quoting *Estrada*, 63 Cal.2d at 745).

Court did cite its recent decision in *Mann, supra,* and the "statutory repeal" cases. However, reference to that line of cases was clearly unnecessary *dicta*, since both the state and federal courts have long held that legislative authority over jurisdiction (*i.e.*, *where* a claim can be asserted, not *whether* it can be asserted – *Hughes, supra*) is given immediate effect but is not retroactive since it deals with future court proceedings not past acts. *See, e.g., Landgraf v. USI Film Products,* 511 U.S. 244, 274 (1994) (and cases cited therein). This is because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties." (*Id.,* quoting *Republic National Bank of Miami v. United States,* 506 U.S. 80, 100 (1992) (Thomas, J., concurring).)

In summary, the new standing requirements contained in Proposition 64 are not applicable to this case due to the absence of any clear expression that retroactivity was intended. Whatever validity once existed for the "statutory repeal" doctrine, our Supreme Court no longer follows it in light of clearly stated requirements – both legislative and judicial – that all statutes be presumed prospective unless clearly appearing otherwise.

Finally, even if this court were to conclude that some life remains in the "statutory repeal" doctrine, it should not be applied here. No "statutory cause of action" or "statutory remedy" has been repealed by Proposition 64, so the circumstances do not fall within the classic articulation of *Callet, Southern Service,* or the other cases describing the doctrine. Instead, Proposition 64 merely amended the UCL to restrict private rights of action by certain persons Moreover, the UCL traces its lineage to common law rights, i.e. common law claims of "unfair competition". While the pre-Proposition 64 version of the UCL was obviously not identical to the common law right which existed in 1872,

nevertheless it derives from it and should not be treated as "purely statutory" for this purpose. The number of "common law" rights which have not changed dramatically over the last 130 years is very small indeed. Since virtually all causes of action are "codified" under our system, an approach which would apply the "statutory repeal" doctrine here would also require it to be applied in almost every modern case.

The cases finding that Proposition 64 should be applied to pending cases have rejected these arguments, instead supporting a broad construction of the "statutory repeal" doctrine by citation to older cases applying the doctrine in a variety of circumstances. *Branick, supra,* 126 Cal.App.4th at 842-843; *Benson, supra,* 126 Cal.App.4th at 903-905; *Bivens, supra,* 2005 Cal. App. LEXIS 256 at n. 4 (and accompanying text). However, plaintiffs respectfully submit that those courts erred in ignoring the impact of the numerous intervening Supreme Court decisions discussed above. Even if that unbroken string of cases is not deemed to have completely abandoned the statutory repeal doctrine, they surely demonstrate that it should be narrowly, not broadly, construed. The Court's decisions in *Myers, Hoffman* and *Balen,* for example, are all flatly inconsistent with a broad reading of the doctrine.

In any event, even if the cases relied upon by MWI were implemented in their broadest sense, it is indisputable that the "statutory repeal" doctrine does not support retroactivity if a "savings clause" exists. (*Callet, supra,* 210 Cal. at 67; *Mann, supra,* 18 Cal.3d at 829). Since the UCL is part of the Business & Professions Code, such a savings clause is present here. Business & Professions Code § 4 states "[n]o action or proceeding commenced before this code takes effect, and no right accrued, is affected by the

provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." This general "savings clause", consistent with the statutory provisions requiring explicit statements of statutory intent before retroactivity will be found, is fully sufficient to deny retroactivity to Proposition 64 even under the "statutory repeal" doctrine. The California Supreme Court has held that "a general savings clause in the general body of the law is as effective as a special savings clause in the particular section." *Peterson v. Ball*, 211 Cal. 461, 475 (1931). Nor are Section Four's provisions limited to the original enactment of the code. Business & Professions Code § 12 states: "Whenever any reference is made to any portion of this code or any other law of this State, such reference shall apply to all amendments and additions thereto now or hereafter made."[22]

III. CONCLUSION

For the foregoing reasons, this motion to dismiss should be denied.

Dated: March 18, 2005

Respectfully submitted,

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Robert M. Bramson

[22] *Cf., Coster v. Warren*, 297 F.2d 418, 420 (9th Cir. 1961); *Sobey v. Molony*, 40 Cal.App.2d 381, 388-89 (1940).

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