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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

FOUNDATION AIDING THE ELDERLY, on behalf of the general public,

Plaintiff,

v.

COVENANT CARE CALIFORNIA, INC.; et al.

Defendants.

FOUNDATION AIDING THE ELDERLY, on behalf of the general public,

Plaintiff,

v.

EMBER CARE CORPORATION; et al.

Defendants.

FOUNDATION AIDING THE ELDERLY, on behalf of the general public,

Plaintiff,

v.

GRANCARE, LLC; et al.

Defendants.

Case No. RG03087211

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Date: February 10, 2005
Time: 9:00 a.m.
Judge: Hon. Ronald Sabraw
Dept: 22

ACTIONS FILED: March 18, 2003
July 8, 2003

TRIAL DATES: April 11, 2005
May 9, 2005
June 6, 2005

[Filed concurrently with Request For Judicial Notice]

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INTRODUCTION

For over 70 years, the Unfair Competition Law ("UCL") has been a powerful tool to compel businesses to comply with their legal obligations. Its controversial private attorney general provision has earned praise from the California Supreme Court, which recently stated that such "actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts." *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126. This same private attorney general provision has spawned hundreds of published appellate decisions and scores of law review articles. Then, on November 2, 2004, the private attorney general provision was deleted from the UCL pursuant to Proposition 64. This sweeping change in policy will have broad effects on the UCL as well as consumer and environmental protection throughout the State. As such, Proposition 64 may not be applied retroactively absent an express declaration of retroactivity, which is absent here. *See Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1226-1227 (statutory amendment that "introduced a new policy which will have broad effect" may not be applied to pending cases absent clear declaration of retroactive intent).

Defendants in these three jointly managed nursing home understaffing cases, Covenant Care, Inc., *et al.*, GranCare, LLC, *et al.* and Ember Care Corporation, *et al.* (together referred to as "Defendants"), nevertheless argue that the recently enacted Proposition 64 requires immediate dismissal of these public interest cases. Dismissal of these cases, which have been pending for almost two years, would have profound effects on parties and non-parties alike.

For example, if these cases were dismissed pursuant to Defendants Motion for Judgment on the Pleadings ("MJOP"), Defendants would be entitled to retain millions of dollars which was illegally obtained from their residents as a result of Defendants' failure to adequately staff their nursing homes. Likewise, the residents of Defendants' nursing homes on whose behalf these lawsuits were filed would lose out on millions of dollars of restitution which is due to them as a result of Defendants' acts of unfair competition. Moreover, plaintiff in these three cases, Foundation Aiding the Elderly ("FATE"), after relying on the Unfair Competition Law's ("UCL") private right of action, would be divested of its ability to represent the rights of the

residents of Defendants' nursing homes whom FATE has been serving for over twenty years.

Applying Proposition 64 to these pending cases would thus drastically alter the legal consequences of Defendants' chronic understaffing as well as impair the reliance by FATE on the prior law. Accordingly, application of Proposition 64 to these cases would constitute a retroactive operation of the law. *See, e.g., Hughes Aircraft Co. v. United States* (1997) 520 U.S. 939, 946; *Evangelatos, supra,* at 1226-1227; *Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal. 4th 828, 839.

Retroactive operation of law, however, is only permitted where there is a "clear manifest" or "unequivocal and inflexible" statement of voter intent, which is entirely absent from the language of both Proposition 64 and the ballot materials that accompanied the initiative. Rather, the both the text of Proposition 64 and its ballot materials specifically state that the initiative applies to shield business from the ***filing*** of new private attorney general cases. No mention is made that Proposition 64 may apply to existing cases. Indeed, had the voters known that Proposition 64 would be used as a sword to slash the rights of consumers, they might have been more cautious about voting for it. Accordingly, under a long line of U.S. and California Supreme Court precedent, Proposition 64 may not be applied to these pending cases.

Defendants attempt to avoid any analysis of statutory construction, voter intent and retroactivity by arguing: (1) Proposition 64 produced merely a procedural change to the UCL which may thus be immediately applied to pending cases; and (2) that Proposition 64 effected a statutory repeal which is must be immediately applied to pending cases. Defendants' arguments are misplaced and largely rely on previously rejected constructions of the law of retroactivity.

Defendants' attempt to characterize Proposition 64 as procedural and thus outside the scope of the presumption against retroactive application is similarly flawed. However, the California Supreme Court has rejected the procedural versus substantive label approach to retroactivity analysis championed by Defendants here in favor of an effect-based approach. *See, e.g., Elsner v. Uveges* 2004 WL 2924303, at *10 (Dec. 20, 2004). Nevertheless, Defendants completely overlook the substantive effects on the rights and obligations of both parties and non-parties alike, as well as the change in legal consequences of the parties' prior actions that would

result from applying Proposition 64 to these cases. Moreover, Defendants ignore United States Supreme Court authority that standing requirements are substantive and changes to them may not be applied retroactively. *See Hughes, supra,* at 951.

Defendants' statutory repeal argument was recently rejected by the California Supreme Court in *Myers,* which refused to apply the rule to the repeal of a statute that granted tobacco manufacturers immunity from common law tort liability. *Myers, supra,* at 841. Moreover, even if it had not been rejected by the Court, it does not apply here, since Proposition 64 did not repeal the courts' ability to order relief under the UCL.

Defendants not only concede, but actively argue that Proposition 64 has a devastating impact on these (and all other) pending private attorney general actions. Their motion seeks dismissal with prejudice of FATE's claims, a dismissal that would effectively bar any litigation or recovery regarding Defendants' understaffing for the year 2000 (since the statute of limitations has run on those violations). Such retroactive effects are only permissible pursuant to a clear statement of legislative intent that Proposition 64 be applied retroactively. Because that intent is utterly lacking, Proposition 64 may not be applied to these cases.

If the Court nevertheless decides to apply Proposition 64 retroactively and grant Defendants' Motion for Judgment on the Pleadings, it must provide FATE leave to amend its complaint to name a new plaintiff who satisfies the requirements of Proposition 64. Since the amended complaint would arise from the exact same set of facts as FATE's original complaint, the amended complaint should be deemed to relate back to the dates these cases were originally filed for statute of limitations purposes. In addition, the Court should protect the due process rights of Defendants' residents by requiring Defendants to provide them with notice that their right to recover restitution may be eliminated by dismissal of these cases.

BACKGROUND AND HISTORY OF THE UCL AND PROPOSITION 64

The UCL was initially codified from the common law tort of unfair business competition in 1933 as former Civil Code §3369, the predecessor to §17200. *Stop Youth Addition, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570; *see also Kraus, supra,* at 131-132 (the right to restitutionary relief under the UCL is a codified common law right). The breadth of

what constituted "unfair competition" was no greater in Civil Code §3369 than that which existed at common law. *International Association of Cleaning and Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, 422. Subsequent court decisions expanded §3369 from actions between business competitors to include consumers victimized by unfair business practices. *People ex rel Mosk v. National Research Co.* (1962) 201 Cal.App.2d 765, 770-71. The UCL has been interpreted to reach "anything that can properly be called a business practice and that at the same time is forbidden by law." *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266-67. It applies to unlawful, deceptive and unfair conduct.

Prior to November 3, 2004, any person acting on behalf of itself, its members or the general public could file an action under the UCL. A plaintiff could seek an injunction or restitution to restore to any person with an ownership interest money or property taken through unfair business practices. *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149-50. Proposition 64 expresses an intent that actions filed subsequent to its passage must comply with a new substantive standing requirement. In order to file an action under Business and Professions Code §17204, a person must now have: (1) suffered injury in fact; ***and*** (2) lost money or property as a result of the unfair business practice. Accordingly, as of November 3, 2004, public interest non-profit groups such as FATE may no longer file UCL claims on behalf of members of the general public – even those members of the general public on whose behalf such groups advocate.

The ballot materials wrongly informed voters that the new standing provision was the equivalent of that under the U.S. Constitution. FATE's Request for Judicial Notice ("RJN") , Exh. 2. However, Article III requires only injury in fact to confer standing; it does not additionally require loss of money or property. *See, e.g., Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.* (2000) 528 U.S. 167, 183. Proposition 64's additional standing requirement beyond that required under Article III – that a prospective UCL plaintiff must have lost money or property as a result of the unfair competition – has profound effects for those seeking to enjoin illegal activities causing them injury in fact. For example, a recreational fisherman may no longer sue to enjoin a farmer from diverting a river and depleting the salmon

supply in violation of the Fish and Game Code. Although the fisherman has suffered injury in fact – the loss of her ability to fish in the river – she has not lost money or property as a result of the farmer's act of unfair competition.

Since Proposition 64 was enacted, the trial courts that have ruled on whether it applies to previously pending cases have split on the issue. While Defendants submitted only those trial court rulings where the judges determined that Proposition 64 applied retroactively[1], an equal but growing number of courts have determined that the new law may not be applied retroactively. *See* RJN, Exhs. 6-10. For example, Judge Kramer of the Complex Department in San Francisco Superior Court has held that "Proposition 64 does not apply to cases already on file as of the time of its enactment." *Id.*, Exh. 6.

ARGUMENT

I. PROPOSITION 64 DOES NOT APPLY TO THESE PREVIOUSLY FILED CASES.

A. Proposition 64 Expressly Applies Only To The *Filing* Of New Cases, Not To Terminate Previously Pending Ones.

The question of whether Proposition 64 applies to previously pending cases such as these is governed by principles of statutory construction. In interpreting an initiative, courts apply the same principles that govern statutory construction. *See Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900. The primary concern is to give effect to the intent of the voters – "the voters should get what they enacted, not more and not less." *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114. Here, the language of the measure clearly states that Proposition 64 is intended to apply to prevent future actions from being ***filed*** by unaffected plaintiffs, not to terminate pending cases. The Court should effectuate the intent of the voters and rule that Proposition 64 does not apply to previously pending cases.

Section 1(e) of the measure provides:

> It is the ***intent of the California voters*** . . . to prohibit private attorneys from ***filing*** lawsuits for unfair competition where they

[1] Not surprisingly, the bulk of the orders finding that Proposition 64 applies retroactively come from judges located in Los Angeles county where the Trevor Law Group debacle occurred.

> have no client who has been injured in fact under the standing requirements of the United States Constitution.

RJN, Exh 1 (emphases added.). Likewise, Section 1(f) of the measure provides:

> It is ***the intent of the California voters*** in enacting this act that only the California Attorney General and local public officials be authorized to ***file and prosecute*** actions on behalf of the general public.

Ibid. (emphases added).

The explanation by the Legislative Analyst and the ballot argument supporting Proposition 64 are consistent with the expressed intent of the voters set forth in the measure's findings – that Proposition 64 applies to the filing of cases. 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." RJN, Exh 2 (emphasis added). The proponents' ballot argument in favor of the measure also emphasized that 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 . . ." *Ibid.* (emphasis added). Finally, the proponents' rebuttal to the argument against Proposition 64 stated that the initiative "[p]ermits only real public officials like the Attorney General or District Attorneys to ***file*** lawsuits on behalf of the People of the State of California." *Ibid.* (emphasis added).

This intent that Proposition 64 should not apply to pending cases was clearly stated by the proponents of the measure prior to the election. When asked point blank whether Proposition 64 would apply retroactively, the proponents responded: "No, it will not. But it will keep small businesses from being victims of shakedown lawsuits in the future." RJN, Exh. 3.

Here, the express "intent of the California voters" is to prohibit unaffected plaintiffs from ***filing*** new lawsuits. The United States Supreme Court has determined that: "[a] new rule concerning the filing of complaints would not govern an action in which the complaint had already been filed under the old regime..." *See Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 275 n. 29. The present lawsuits were filed long before Proposition 64 became effective.

Accordingly, Proposition 64 does not apply to these cases.

B. Proposition 64 May Not Be Applied To Dismiss FATE's Previously Pending UCL Claims Since There Is No Indication That The Measure Was Intended To Have Retroactive Effect.

In order to preserve "a rule of law that gives people confidence about the legal consequences of their actions," a newly enacted statute does not apply retroactively to cases pending prior to its enactment absent the clear and manifest intent of the legislature. *Myers, supra*, at 843. This rule of statutory construction, which Defendants completely ignore in their opening brief, is codified in Section 3 of the California Civil Code and repeatedly cited in controlling precedents of both the United States and California Supreme Courts. If applied to these pending cases, Proposition 64 would affect the rights and liabilities of parties and non-parties alike, as well as change the legal consequences of the parties' prior actions. As such, Proposition 64 would have retroactive effect on these cases.[2] Because Proposition 64 expresses no intent to apply retroactively, it may not be applied to these or any other cases that were pending prior to its effective date. *See Evangelatos, supra*, at 1209.

1. The Presumption Against Retroactivity Applies Here Since Dismissing These Previously Pending Cases Pursuant To Proposition 64 Would Substantially Impact the Rights And Obligations Of Parties And Non-Parties.

The California Supreme Court recently affirmed the principle that the determination of whether a statute has retroactive effect is based on function rather than form. *See Elsner, supra*, at *10. The pertinent question in this analysis is whether the new law changes the legal consequences of past actions or substantially affects existing rights and obligations. *Ibid.*; *Evangelatos, supra,* at 1226-1227; *Myers, supra,* at 839; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 290; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 395. If so, the statute has retroactive effect and may not be applied to pending cases absent clear and manifest intent of the legislature or electorate. *Myers, supra*, at 843.

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[2] *See Evangelatos, supra*, at1206 ("a retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute"),*citing Aetna, supra,* at 391; *Myers, supra*, at 839 (a retrospective law is one that effects rights or obligations that existed prior to the adoption of the law); *Tapia, supra,* at 290 (a statute is retrospective if it operates to "change the legal consequences of the parties' past conduct").

In *Aetna*, the California Supreme Court held that a statute that increased compensation for certain injured workers would have retroactive effect if it were applied to a worker who sustained his injury prior to the effective date of the statute. *Aetna, supra,* at 396. 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* concerning a prior tort reform measure which eliminated joint and several liability. The Court explained that the 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." *Evangelatos, supra,* at 1225, fn. 26.

Applying Proposition 64 to these pending actions would have significant legal consequences affecting the rights and obligations of parties and non-parties alike, thereby abrogating the rights of FATE, the residents, and others regarding fair notice, reasonable reliance and settled expectations. *See People v. Grant* (1999) 20 Cal.4th 150, 157, *citing Landgraf, supra*, at 268. Application of Proposition 64 to these pending cases would:

(1) deprive FATE, who took irreversible actions in reasonable reliance on the UCL's private attorney general provision, of its right to maintain these actions on behalf of Defendants' residents;

(2) allow Defendants to retain millions of dollars that they bilked from their residents by failing to deliver legally adequate staffing;

(3) foreclose Defendants' residents from recovering significant amounts of money owed to them as a result of Defendants' illegal understaffing;

(4) deprive Defendants' residents of the right to bring an action to compel Defendants to provide sufficient staffing in their nursing homes unless they have lost money or property as a result of Defendants' understaffing; and

(5) deprive government attorneys that relied on FATE's ability to pursue these cases

in its private attorney general capacity from making an informed decision regarding whether to take on these important cases.

Defendants argue that the rights and obligations affected by application of Proposition 64 here are not substantial because public enforcers and individuals who have suffered injury in fact and lost money or property may still file a UCL action against them based on their illegal understaffing. MJOP, p. 15. Such an argument overlooks the statute of limitations, which would bar at least one year of the violations at issue in these cases, allowing defendants to unjustly retain money owed to the residents and forcing the residents to forfeit millions of dollars.

These cases were filed in March and July 2003 and seek restitution on behalf of residents of Defendants' nursing homes over the period from January 1, 2000 up through the present. If the Court were to apply Proposition 64 to this case and require its dismissal, any case filed by an individual or entity with standing under the new law could only recover restitution for the period dating back four years from the filing of a new complaint. Even if such an action were filed today, it could only seek restitution from January 14, 2001 up through the present. Thus, Defendants would be allowed to keep all of the money they overcharged residents during the year 2000 that was paid for the statutorily required nursing staff that Defendants did not provide. This is in direct contravention of one of the substantive purposes underlying the UCL – to "foreclose retention by the violator of its ill-gotten gains." *Bank of the West, supra*, at 1267. Defendants' liability for their past acts would thereby be severely limited.

The other side of this coin is that, if Proposition 64 is applied to these cases, those residents of Defendants' nursing homes would be barred from recovering any restitution for the overpayments they made (or that were made on their behalf) for the year 2000. This is a particularly harsh result given that the Court has previously determined that FATE presented "persuasive evidence" that Defendants unlawfully understaffed their facilities in 2000. RJN,

Exh. 4. Thus, applying Proposition 64 here would substantially affect the right of Defendants' residents to recover restitution.[3]

Moreover, application of Proposition 64 to these pending cases would permanently deprive residents who are injured by Defendants' understaffing from bringing a UCL action to enjoin Defendants' unlawful and deceptive activities unless they have lost money or property as a result of the understaffing. While residents who have paid for their care themselves or had it paid on their behalf in a manner in which they have an ownership interest would have standing under the new law, Defendants contend that all of their residents who have their residency paid for by either Medicare or Medi-Cal do not have an ownership interest in the money paid to Defendants. If Defendants are correct, a significant number of injured residents would lose their ability to obtain any personal recourse whatsoever for Defendants' unlawful activities.

Additionally, because FATE reasonably relied on the private attorney general provision of the UCL at the time these cases were filed in 2003, application of Proposition 64 would impair the rights of FATE and the residents regarding fair notice, reasonable reliance and settled expectations. *See Grant, supra,* at 157, *citing Landgraf, supra*, at 268; *Evangelatos, supra,* at 1213-14. There are other choices FATE could have made prior to filing this case. For example, FATE could have polled its clients and constituents to add individual plaintiffs, allowing such individuals to bring the claims in either an individual or class action capacity. FATE also could have brought the action to or with the Attorney General or a district attorney. FATE's choice to bring the action in a representative capacity was made in reasonable reliance on the old law. *Evangelatos, supra,* at 1213-14. The fact that the electorate chose to adopt a new rule for the future does not demonstrate an intent to apply it retroactively to defeat the reasonable expectations of those who have changed their position in reliance on the old law. *Ibid.*

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[3] Applying Proposition 64 to previously pending cases would also have drastic and unfair effects in cases in which an uninjured UCL plaintiff has already obtained a favorable judgment on behalf of others. For example, applying Proposition 64 to the *Schwartz v. Visa* case that was tried before this Court would deprive consumers of approximately $800 million in restitution and allow the defendants to retain those ill-gotten gains from a practice already found by the Court to be unfair and intentional. *Schwartz v. Visa,* Alameda Sup. Ct. No. 822404-4.

While FATE is not prevented from amending its complaint to satisfy the new standing requirements, its possible inability to do so at this stage in the litigation could result in a dismissal of the action. Such a result would be a clear abrogation of the substantive rights of FATE and the residents on whose behalf it filed suit and thus a retroactive application of the new law. *See Hughes, supra,* at 951. Moreover, whether FATE can amend its complaint is immaterial, as determining the retroactivity issue should not be made on a fact-specific, case-by-case basis. *See Scott v. Boos* (9th Cir. 2000) 215 F.3d 940, 950.

Finally, government enforcers may have reasonably relied on the private attorney general provision of the UCL in deciding not to file these cases. The California Supreme Court has long recognized that the private attorney general provision of the UCL aids government attorneys. *Kraus, supra*, at 126. However, if Proposition 64 is applied retroactively, government attorneys who did not file suit because of existing private attorney general cases will be unable to enforce any past violation for which the statute of limitations has run. In effect, this would allow even the most egregious violations of the UCL to go unenforced. This could not have been the intent of the electorate.

All of these substantial legal consequences that would stem from application of Proposition 64 to these cases lead to the unmistakable conclusion that such application would have retroactive effect. Thus, the presumption against retroactivity applies to Proposition 64. *Elsner, supra, at *10; Evangelatos, supra,* at 1209; *Myers, supra,* at 841; *Tapia, supra*, at 290.

2. Given The Absence Of Retroactive Intent, Proposition 64 May Not Be Applied To These Previously Pending Cases.

In reviewing an earlier "tort reform" initiative, the California Supreme Court set out the principles applicable here. Holding that Proposition 51 applied prospectively, the Court relied on the "widely recognized legal principle, specifically embodied in section 3 of the Civil Code, that in the absence of a clear legislative intent to the contrary statutory enactments apply prospectively." *Evangelatos, supra,* at 1193-1194. The Court noted that "the drafters of the initiative measure in question, although presumably aware of this familiar legal precept, did not include any language in the initiative indicating that the measure was to apply retroactively" and

that "there is nothing to suggest that the electorate considered the issue of retroactivity at all." *Id.* at 1194. Observing that "the overwhelming majority of prior judicial decisions – both in California and throughout the country – which have considered whether similar tort reform legislation should apply prospectively or retroactively . . . have concluded that the statute applies prospectively," the Court refused to give the measure retroactive effect. *Ibid.*

Evangelatos is consistent with a long line of California cases. Recently, in *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 475, the Supreme Court refused to give retroactive effect to an amendment to the Fair Employment and Housing Act that imposed personal liability for harassment on nonsupervisory workers, citing *Evangelatos* and other cases and saying: "[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.'" *Id.* at 475, *quoting United States v. Heth* (1806) 7 U.S. 399, 413. In fact, this same principle has been applied to reject retroactive application of earlier amendments to the UCL. *See Solomon v. North American Life and Casualty Ins. Co.* (9th Cir. 1998) 151 F.3d 1132, 1139.

So it should be here. Nothing in Proposition 64 indicates ***any*** legislative intent, much less a clear one, that the measure was intended to apply to cases already under way.[4] *See Evangelatos, supra,* at 1194 (concluding that Proposition 51 "did not include any language . . . indicating that the measure was to apply retroactively . . ."). "The 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.3d 810, 818.

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[4] Although it is not relevant to these cases because they were all filed long before Proposition 64 was passed, application of Proposition 64 to cases ***filed*** after November 3, 2004 concerning conduct occurring prior to that date can still have retroactive effect. That issue – whether Proposition 64 can be applied to cases concerning conduct occurring prior to, but filed after November 3, 2004 – is a much more difficult issue. Although the ballot materials express an intent that the measure should apply to the filing of cases, it is not clear whether those statements meet the "clear manifest" intent required to overcome the presumption against retroactivity. See *Myers, supra,* at 841.

Some defendants[5] argue that Proposition 64's stated intent "to eliminate frivolous unfair competition lawsuits"[6] demonstrates an intent that Proposition 64 should be applied retroactively. In *Boos, supra*, the Ninth Circuit interpreted almost identical language to mean the exact opposite – that the law at issue therein should not be applied retroactively. *Boos*, 215 F.3d at 945. The *Boos* court analyzed the stated legislative intent to the Private Securities Litigation Reform Act of 1995 ("PSLRA") which was to "'to address a significant number of frivolous actions based on alleged securities law violations.'" *Boos, supra,* at 945 (citations omitted). The court interpreted that language as proof that the amendment "did not seek to 'simply change the tribunal to hear the case;' ***the intent was substantive*** - to deprive plaintiffs of the right to bring securities fraud based RICO claims." *Ibid.* (emphasis added, citations omitted). The court went on to reject the defendant's argument that the stated intent to end frivolous RICO claims manifested an intent to apply the amendment to pending cases stating that: "even where 'retroactive application of a new statute would vindicate its purpose more fully ... [this] is not a sufficient reason to rebut the presumption against retroactivity.'" *Id.* at 948-949, citing *Landgraf, supra*, 511 U.S. at 285-286.

Other defendants argue that the amended post-Proposition 64 version of Business and Professions Code §17204 expressly does not allow for the "prosecution" of UCL claims by unaffected plaintiffs. This, however, hardly qualifies as the type of "clear manifest" or "unequivocal and inflexible" statement that is required to allow for retroactive application of a statute, such as Proposition 64, that impairs antecedent rights. *Myers, supra*, at 843.

In *Myers*, the Supreme Court held that the following language, which is far more indicative of an intent to apply a statute to pending cases, was insufficient to overcome the presumption against retroactivity:

When enacted, subdivision (f) of the Repeal Statute provided: "It is

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[5] FATE is mindful that there are a number of other cases in which the Proposition 64 issue will be heard by the Court together with these cases. FATE has thus attempted to address the arguments raised by the defendants in those other cases to the extent such arguments were not raised by the Defendants here.

[6] RJN, Exh. 1, Sec. 1(d) and (e).

> the intention of the Legislature in enacting the amendments to subdivisions (a) and (b) of this section adopted at the 1997- 98 Regular Session to declare that ***there exists no statutory bar*** to tobacco- related personal injury, wrongful death, or other tort claims against tobacco manufacturers and their successors in interest by California smokers or others ***who have suffered or incurred injuries,*** damages, or costs arising from the promotion, marketing, sale, or consumption of tobacco products. It is also the intention of the Legislature to clarify that such claims which ***were or are brought*** shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense."

Id. at 842 (emphases added). Thus, even though the Legislature stated its intention that the repeal of the immunity statute effected by Civil Code §1714.45 should allow claims that "were" brought to be decided on the merits, the court held that this language did not manifest the clear intent necessary to allow for retroactive application. Here, the mere fact that Proposition 64, as integrated into Section 17204, no longer allows for "prosecution" of UCL claims by unaffected plaintiffs does not overcome the strong presumption against retroactive application.

In the absence of an express provision mandating retroactive application of a statute, courts may resort to legislative history, such as the ballot pamphlet. *Evangelatos, supra,* at 1210-1211. Neither the Attorney General's title and summary nor the Legislative Analyst's fiscal analysis, however, advised voters that the measure would apply to pending cases. Instead, such materials express the voters' intent and the Legislative Analyst's concurrence that Proposition 64 will apply to newly filed cases. *See* §I.A., *supra.*

Proposition 64 contrasts sharply with an earlier tort reform initiative that appeared on the November 5, 1996 ballot. Proposition 213 enacted Civil Code section 3333.4, which bars uninsured motorists from recovering noneconomic damages if they are injured by another driver. *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 978. Unlike Proposition 64, Proposition 213 specifically provided that "[i]ts provisions shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997."[7] *Id.* at 979. Had Proposition 64's

[7] In *Yoshioka*, the Second District Court of Appeal considered whether even this language was sufficient to overcome the presumption against retroactivity. Without concluding whether the language in the initiative, standing alone, would be enough to make the statute

drafters wished to make their measure retroactive, they need only have inserted similar language into their measure. The fact that they did not means that the measure lacks the "clear legislative intent" required to make it apply retroactively. *See Myers, supra,* at 843.

It is not surprising that Proposition 64's proponents chose not to include a retroactivity provision. Telling the voters that enacting Proposition 64 would allow businesses to completely escape responsibility for violating consumer and health and safety laws may have made the measure less popular. Application of Proposition 64 in a manner that may be contrary to the measure supported by the voters would be improper.[8]

C. Application Of Proposition 64 Here Would Impair The Residents' Vested Property Rights And Thus Could Not Be Applied To These Cases Under Any Circumstances.

An established rule of statutory construction requires courts to construe statutes to avoid "constitutional infirmities." *Myers, supra*, at 846. Here, applying Proposition 64 to these cases would violate the due process rights of Defendants' residents. Thus, retroactive application of Proposition 64 is prohibited, even if the Court determines that there is voter intent for such application.

Dismissal of these cases with prejudice at this stage would eliminate any opportunity for Defendants' residents to recover restitution for Defendants' understaffing in the year 2000. Applying Proposition 64 to these previously pending cases would therefore violate due process by impairing the vested property rights of those injured by Defendants' violations of the UCL. *See Bank of America v. Angel View Crippled Children's Foundation* (1999) 72 Cal.App.4th 451, 458-9 (a retroactive statute generally offends due process if it impairs a contract or vested right without sufficient justification).

The California Supreme Court has made clear that UCL plaintiffs seeking

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retroactive, the court held that coupled with other language from the ballot pamphlet, there was clear intent on the part of the voters that the initiative would apply to plaintiff's case, which was pending when the measure passed. *Id.* at 979-981.

[8] *See Evangelatos, supra*, at 1217 ("a voter who supported the remedial changes embodied in Proposition 51 would not necessarily have supported the retroactive application of those changes to defeat the reasonable expectations of individuals who had taken irreversible actions in reliance on the preexisting state of the law").

restitution may do so because they have a ***vested*** interest in the money or property wrongfully taken from them pursuant to an unfair business practice. *See Kraus, supra,* at 126; *Korea Supply Co., supra,* at 1149. Moreover, the Supreme Court made it equally clear that non-parties in interest also have due process rights which would be violated if their property rights were impaired without, at least, notice. *Kraus,* 23 Cal.4th at 138, fn. 18. Moreover, the ability to invoke a court of equity to restore property wrongfully taken by unfair business practices is a long standing common law right. *See Kraus, supra,* at 131-132. Thus, the right to recover restitution under the UCL is a vested right which may not be abridged via retroactive application of Proposition 64. Accordingly, irrespective of voter intent, Proposition 64 may not be applied to these pending cases, as it would abridge the vested rights of the residents of Defendants' nursing homes.

II. DEFENDANTS' ATTEMPT TO RE-CAST PROPOSITION 64'S SUBSTANTIVE AMENDMENT OF THE UCL AS MERELY A PROCEDURAL CHANGE FAILS.

Although Defendants acknowledge the rule that retroactivity must be determined based on effects rather than labels (MJOP, p. 13:16-17), they nevertheless rely on labels over substance by focusing on irrelevant cases characterizing standing as "procedural." By ignoring the actual effects of applying Proposition 64 to these cases, Defendants arrive at the anomalous conclusion that a statute resulting in the ultimate substantive effect – dismissal with prejudice that will bar millions of dollars in monetary claims – is merely procedural. Not surprisingly, none of the cases cited by Defendants support this conclusion.

While some cases cited by Defendants have labeled standing as a procedural matter, the United States Supreme Court recognizes that an amended standing provision can attach new legal consequences to past acts and thus be subject to the presumption against retroactivity. In *Hughes, supra,* an amendment that expanded the right of private parties to bring suits under the False Claims Act ("FCA") could not be applied retroactively, because to do so would expand defendant's exposure to liability – even though the standing of governmental parties was not affected by the amendment.

> While we acknowledge that the monetary liability faced by an FCA defendant is the same whether the action is brought by the

> Government or a *qui tam* relator, the 1986 amendment eliminates a defense to a *qui tam* suit – prior disclosure to the Government – and therefore changes the substance of the existing cause of action for *qui tam* defendants by 'attach[ing] a new disability, in respect to transactions or considerations already past.' (Citations)

Hughes, supra, at 948.[9] Here, the converse would be true: retroactive application of Proposition 64 would reduce defendants' exposure to suit by stripping representative plaintiffs of standing.

The Ninth Circuit recently relied on *Hughes* in a case that is analogous to the present action. In *Boos, supra*, the court held that a provision of the PSLRA, which eliminated private standing to pursue securities fraud claims under RICO, could not be applied to cases concerning conduct that occurred prior to the enactment of the PSLRA. *Boos, supra,* at 944-945. The court concluded that applying the PSLRA to conduct occurring prior to its passage would have retroactive effect "because prior to the PSLRA a plaintiff had a RICO claim based on a defendants' alleged securities fraud, while afterwards a plaintiff does not." *Ibid.* So too here. Prior to Proposition 64, FATE could bring a UCL claim based upon Defendants' understaffing, while afterwards FATE may not. Accordingly, like the PSLRA, Proposition 64 may not be applied retroactively.

This case is also similar to a case involving an amendment to the Clean Water Act that barred private suits. In *Proffitt v. Municipal Authority of the Borough of Morrisville* (E.D. Pa. 1989) 716 F. Supp. 837, 844, the district court held that the amendment could not be applied retroactively to revoke a private citizen's standing to maintain an action commenced prior to the effective date of the action.[10]

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[9] Defendants rely on *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513 for the proposition that a statute expanding standing in probate court to allow suit by the decedent's daughter was a procedural change that could be applied to pending cases. MJOP, p. 12:13-23. This holding cannot be squared with the United States Supreme Court's subsequent decision in *Hughes*. The *Parsons* decision also directly conflicts with the California court of appeal's later decision in *In re Daniel H.* (2002) 99 Cal.App.4th 804. Accordingly, this Court should follow the *Hughes* and *In re Daniel H.* decisions in their determinations that altered standing provisions are subject to the presumption against retroactivity.

[10] Although neither the *Boos* or *Proffitt* cases are technically binding on this Court, the California Supreme Court has determined that California courts apply the same general principles regarding retroactivity analysis as do federal courts. *See Myers, supra*, at 841.

Professor Witkin neatly summarized why concepts of standing are substantive and not procedural:

> The person who has the right to sue under the substantive law is the real party in interest; the inquiry, therefore, while superficially concerned with procedural rules, really calls for a consideration of rights and obligations.

4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 104, p. 162.

Of the cases cited by Defendants in support of their contention that the changes to Proposition 64 are procedural rather than substantive, the laws that the courts characterized as procedural did not have such broad effects as dismissal of the case, let alone the dismissal of hundreds of cases.[11] There are two distinguishable exceptions. The first is *Republic Corp. Superior Court* (1984) 160 Cal.App.3d 1253, which held that an amended statute governing the dismissal of actions for failure to timely serve was procedural. The amended law was passed specifically to nullify a prior court decision erroneously interpreting the same statute as to allow certain excuses for belated service. *Id.* at 1256. While the application of the new law had a substantive result (the dismissal of the plaintiff's claims), the court's application of the amended law to the pending action was permissible as the new law was simply a codification of the Legislature's prior intent which was necessary to overrule a contrary judicial ruling. The second case, *Parsons*, in which a law that expanded standing in probate court was found procedural, cannot be squared with subsequent court decisions, as discussed *infra* in footnote 12. *Parsons, supra,* at 1523-24. Moreover, the effect of applying the new law was minimal since the plaintiff could have simply filed a new petition under the new law since (unlike here) there was no statute of limitations issue.

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[11] *See Strauch v. Superior Court* (1980) 107 Cal.App.3d 45, 49 (belated filing of certificate of merit was curable by plaintiff's subsequent filing of the certificate); *Brenton v. Metabolife* (2004) 116 Cal.App.4th 679, 689 (anti-SLAPP provision was procedural "screening mechanism;" case could still be defended on the merits); *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 356 (same as *Brenton*); *Tapia, supra,* at 299 (amendment changed, but did not eliminate, *voir dire* procedure); *Pebworth v. Workers' Compensation Appeals Board* (2004) 116 Cal.App.4th 913, 919 (employee allowed to settle disability benefits for a lump sum); *Andrus v. Municipal Court* (1983) 143 Cal.App.3d 1041, 1046-47 (termination of appeal from municipal court had little effect as several other avenues to appeal still open); *ARA Living Centers v. Superior Court* (1993) 18 Cal.App.4th 1556, 1562 (award of attorneys' fees was procedural law; extension of standing and addition of punitive damages was substantive change in law).

Defendants also seek to downplay the significant effects of Proposition 64 by arguing that the underlying staffing law at issue remains unchanged. MJOP, p. 15. This is the precise argument that was "made, and rejected" by the Supreme Court in both *Landgraf* and *Hughes*. *Hughes,* supra at 947-948 (rejecting defendants' argument that amendment to FCA standing requirement is not substantive since submitting false claims to the government was a violation of the law both before and after the amendment).

Here, both the intent and the effect of Proposition 64 is substantive – to deprive private attorneys general from filing UCL claims. It is not possible to characterize such a sweeping change in the long-standing policy underlying the UCL as procedural.

III. DEFENDANTS' RELIANCE ON AN INFLEXIBLE RULE REGARDING STATUTORY REPEALS IS MISPLACED AND OUTDATED.

As discussed above, Proposition 64 made substantial changes to the UCL, which, if applied to pending cases would have broad unanticipated consequences to parties and non-parties alike. Proposition 64 did not, however, repeal the UCL or change the remedies available thereunder. After Proposition 64 as before, the UCL provides this Court with the authority to order Defendants to comply with the minimum staffing statute at issue in these cases. This Court also retains the authority to order Defendants to pay restitution to those persons in interest who lost money or property as a result of Defendants' understaffing. Nevertheless, Defendants rely on a line of cases for the proposition that the unconditional repeal of a statutory cause of action without a savings clause stops all litigation based upon that statute. Defendants' reliance on this "statutory repeal rule" fails because: (1) the "statutory repeal rule" was recently rejected by the California Supreme Court in favor of the *Evangelatos* legislative/voter intent approach; (2) Proposition 64 did not result in a repeal of the UCL; and (3) by its own terms, the "statutory repeal rule" does not apply to causes of action codified from the common law or that affect vested rights.

A. The California Supreme Court Recently Rejected The Inflexible Rule Regarding Statutory Repeals Relied On By Defendants.

Defendants contend that this Court should apply the statutory repeal rule to these cases without regard to voter intent. Such a reflexive approach was recently rejected by the

California Supreme Court in *Myers*. Defendants utterly fail to distinguish or even cite to *Myers*, which defeats their "statutory repeal" argument.

In *Myers*, the Legislature repealed a statute that granted cigarette manufacturers immunity from common law tort liability. Although the immunity statute created a purely statutory right for the cigarette companies, the Supreme Court refused to apply the repeal of the immunity statute retroactively. In his dissent, Justice Moreno cited the statutory repeal rule, arguing that:

> the immunity involved here was wholly a creation of statute, and its abolition does not affect the tobacco companies' right to assert common law defenses in product liability actions. (Cf. Callet v. Alioto (1930) 210 Cal. 65, 67-68 [statutory rights, unlike common law rights, not vested for purposes of retroactive application of a statute because 'all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time"].)

28 Cal.4th at 853 (dissenting opinion).

The majority was not persuaded. Although the statutory repeal rule was not explicitly referenced by the Court, it clearly rejected the dissent's views. Instead, the Court relied heavily on *Evangelatos* and its requirement, which the Court emphasized with its own italics, 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.'" *Myers*, 28 Cal.4th at 841, *citing Evangelatos*, 44 Cal.3d at 1209 (emphasis in original). Thus, in *Myers*, the Court effectively brought the old retroactive repeal rule into the *Evangelatos* doctrine, a much more manageable and definitive approach to statutory construction and one that is grounded in the cardinal rule that all canons of statutory construction are designed to ascertain only one thing: legislative intent. *See 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.").

B. Even If The Statutory Repeal Rule Survives *Myers*, It Does Not Apply Here.

1. Proposition 64 Did Not Effect A Statutory Repeal.

The cases relied upon by Defendants for the statutory repeal rule fall into two categories: (1) those in which the statutory repeal completely deprived the courts of any authority to order the relief requested (*see, e.g. Younger v. Superior Court* (1978) 21 Cal.3d 102; *Governing Board v. Mann* (1977) 18 Cal.3d 819); and (2) cases concerning the application of the amendment to the anti-SLAPP statute, CCP §425.17, to pending cases. *See, e.g. Brenton, supra,* at 679; *Physicians Committee For Responsible Medicine v. Tyson Foods, Inc.* (2004) 19 Cal.App. 4th 120; *Northern California Carpenters Regional Council v. Warmington* (2004) 124 Cal.App.4th 296 (the "CCP §425.17 Cases"). Although the analysis regarding these groups of cases is different, the result is the same: the "statutory repeal rule" does not apply to Proposition 64.

Under the *Younger/Mann* line of cases, the statutory repeals at issue completely deprived the courts of their ability to order the requested relief, which prompted the California Supreme Court to hold that such repeals must apply to pending cases. *Younger, supra,* at 111; *Mann, supra,* at 830-831. That is not what happened here. Proposition 64 did not repeal the courts' ability to order injunctive relief and restitution under the UCL. The courts' ability to order such relief remains unimpaired. Accordingly, Proposition 64 did not effect a statutory repeal within the meaning of the *Younger/Mann* line of cases.

Both *Mann* and *Younger* can and should be squared with the Court's focus on legislative intent in retroactivity analysis. *See, e.g., Evangelatos, supra.* In *Mann*, the statute contained unambiguous legislative intent to remove a public entity's right to take disciplinary actions based on marijuana convictions obtained more than two years prior to the statute's enactment. *Mann, supra,* at 827. In *Younger*, the statute contained unambiguous evidence of legislative intent to divest the superior courts of jurisdiction to order destruction of marijuana arrest or conviction records, but it also required the Court to ask whether the Legislature truly intended to make the Attorney General destroy such records if appeals were still pending. *Younger, supra,* at 110. Finding no such evidence, the Court construed the legislation to require

finality of the conviction. *Ibid.* Thus, in both Younger and Mann, the Court interpreted the complete divestiture of the courts' authority to order the requested relief as evidence of clear and manifest legislative intent that such relief should no longer be available in any circumstances.

Nor do the CCP §425.17 Cases control or apply to the question of whether Proposition 64 may be retroactively applied to these cases. Although Defendants attempt to portray the CCP §425.17 Cases as additional support for the same statutory repeal rule discussed in *Younger* and *Mann*, they are not. The CCP §425.17 Cases essentially blend the statutory repeal and substance versus procedure analyses by equating a "remedial statute," to which the repeal rule applies, with a procedural statute, which applies to pending cases because it has no retroactive effects. *See, e.g., Brenton, supra* at 689 ("Section 425.17 is properly characterized as a procedural statute applicable to pending actions."). Thus, although they refer to the "statutory repeal rule," the CCP §425.17 Cases followed the California Supreme Court's guidance that courts should look to the practical effects of applying a new law to pending cases. *Brenton, supra,* at 689-690; *Physicians' Committee, supra,* at 127; *Warmington, supra,* at 922. Indeed, at least one court ruling on whether CCP §425.17 should apply to previously pending cases did not rely on or even cite to the statutory repeal rule. *See Blanchard v. DirectTV, Inc.* (2004) 123 Cal.App.4th 903, 912 fn. 5 ("As the statute constitutes a change in procedure only . . . [CCP §425.17] works in the future.")

The courts' decisions in the CCP §425.17 Cases are fully consistent with FATE's analysis herein. Because losing the right to file a particular motion does not substantially affect the rights and obligations of the parties or change the legal consequences of their past actions, the amendment to the anti-SLAPP statute was not subject to the presumption against retroactivity. In contrast, the dismissal of hundreds of UCL claims, and the corresponding changes to the rights, obligations and legal consequences for parties and non-parties, subject Proposition 64 to the presumption against retroactivity. Because Proposition 64 lacks the clear and manifest intent to apply retroactively, it may not be applied to these or any other previously pending cases.

2. By Its Own Terms, The Outdated Statutory Repeal Rule Never Applied To Statutes Like The UCL That Are Derived From The Common Law.

Even if the Court determines that the statutory repeal rule could apply to the type of statutory changes made by Proposition 64, the rule cannot apply here because: (1) the UCL is derived from the common law claim for unfair competition; and (2) stopping all pending private attorney general UCL actions would impair vested rights. Accordingly, even if the statutory repeal rule survives *Myers* and applies in cases where the underlying remedies were not repealed, it may not be applied here.

The *Younger/Mann* line of cases holds that the repeal of a statutory right – a right "unknown at common law"– requires a savings clause in order to avoid retroactive application. That rule does not apply here since the unfair competition cause of action was not "unknown at common law." In fact, the predecessor to the UCL, Civil Code section 3369, codified the common law tort of unfair business competition. *See Stop Youth Addition, supra*, at 570; *Kraus, supra*, at 131-132. While it is true that the "statutory definition of 'unfair competition' 'cannot be equated with the common law definition . . . .' [Citation]," *Bank of the West, supra*, at 1264, that does not detract from the fact that the cause of action now embodied in section 17200 is ***derived from*** the common law. Because section 17200 exists "by virtue of a statute codifying the common law," the statutory repeal rule (to the extent it still has any validity after *Myers*) cannot apply to amendments to the UCL. *See Callet, supra*, at 68.

In addition to its inapplicability to the repeal of statutes derived from the common law, the statutory repeal rule may not be applied to impair vested rights. *Callet, supra*, at 67-68. As discussed above in Section I.C., *infra*, application of Proposition 64 here would violate the due process rights of Defendants' residents by permanently barring them from seeking at least part of the vested restitutionary relief due to them as a result of Defendants' illegal understaffing.

IV. IF THE COURT APPLIES PROPOSITION 64 RETROACTIVELY TO THIS CASE, FATE SHOULD BE GIVEN LEAVE TO AMEND, FATE'S AMENDED COMPLAINT SHOULD RELATE BACK TO THE DATE OF THE ORIGINAL COMPLAINT, AND DEFENDANTS SHOULD BE REQUIRED TO PROVIDE NOTICE TO AFFECTED INDIVIDUALS.

FATE does not believe that Proposition 64 should be retroactively applied to this case. However, if the Court disagrees and grants Defendants' MJOP as to FATE's UCL claims, the Court should provide FATE leave to amend the complaints in these cases to satisfy the requirements of Proposition 64 by naming one or more residents of Defendants' nursing homes, their family members or one or more governmental entities as plaintiffs. Such an amendment would not prejudice Defendants since it would merely substitute a new plaintiff or plaintiffs to pursue Defendants for the same staffing violations that have been at issue in this case from the outset. Furthermore, since the new plaintiffs' claims would arise from the exact same set of facts as FATE's original complaint, the amended complaints should be deemed to relate back to the date the original complaints were filed for statute of limitations purposes. Additionally, in order to protect the vested rights of Defendants' residents (and those who paid for their care), the Court should require Defendants to provide such individuals with notice that their right to recover restitution from Defendants may be eliminated if they do not come forward to pursue their claims.

A. If The Court Applies Proposition 64 Retroactively, FATE Should Be Granted Leave To Amend To Add One Or More Plaintiffs Who Satisfy Proposition 64's Requirements.

Subsequent to Proposition 64 as before, Defendants' illegal understaffing constitutes an unlawful business practice which may be remedied through the UCL. Accordingly, the underlying UCL claims set forth in FATE's complaints remain valid, even if Proposition 64 is retroactively applied to these cases. Because the only defect in the UCL claims would be FATE's lack of standing, longstanding California precedent provides that FATE must be granted an opportunity to amend its complaints should the Court determine that it is divested of standing to pursue the UCL claims.

Upon sustaining a demurrer or granting a motion for judgment on the pleadings, a court is required to grant the plaintiff leave to amend unless the complaint shows on its face that

it is incapable of amendment. *See, e.g., Rader Company v. Stone* (1986) 178 Cal.App.3d 10, 20.[12] Here, if the Court decides to apply Proposition 64 retroactively to FATE's claims under the UCL, the ensuing defect in FATE's complaints can be cured by substituting in a new plaintiff or plaintiffs who can meet Proposition 64's new requirements.[13]

Allowing FATE to amend its complaint in this respect would also be consistent with the liberal standard governing requests to amend pleadings. *See generally* CCP §473; *California Cas. Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 278. Moreover, This liberal policy to allow amendment of pleadings applies at any stage of the proceeding. *Hirsa v. Superior Ct.* (1981) 118 Cal.App.3d 486, 488-89; *see also* CCP §576 ("Any judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading . . . ."). Doubts about whether to permit amendments to a pleading ought to be resolved most often in favor of allowing the amendment. *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296-97. Furthermore, the California courts have held that in most instances denial of leave to amend constitutes an abuse of the trial court's discretion. *See, e.g., Angie M. v. Superior Ct.* (1995) 37 Cal. App. 4th 1217, 1227; *see also Wright v. Fireman's Fund Ins. Cos.* (1992) 11 Cal. App. 4th 998, 1013 n. 6.

The California Supreme Court has even applied this liberal policy toward pleading amendments to allow the substitution of a new plaintiff ***post-trial*** where the original plaintiff lacked capacity to sue. *California Gas Retailers v. Regal Petroleum Corp. of Fresno* (1958) 50 Cal.2d 844, 850-51; *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 21. Later cases "have recognized that *Klopstock* stands for the proposition that California Code of Civil Procedure

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[12] *See also Kapsimallis v. Allstate Insurance Co.* (2002) 104 Cal.App.4th 667, 672 (motion for judgment on the pleadings is equivalent to demurrer); *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal. App. 4th 497 (liberal amendment standards applied to granting of motion for judgment on the pleadings).

[13] Although FATE, an uninjured representative plaintiff, does not meet the standing requirements of Proposition 64, Defendants' residents and governmental enforcers clearly do. As FATE has always alleged in its complaint, Defendants' residents have suffered injury in fact and lost money as a result of Defendants' understaffing. Any such individuals could also serve as a class representative under CCP §382. Furthermore, since Proposition 64 did not affect the right of certain public entities to pursue injunctive relief, restitution and civil penalties on behalf of the general public, FATE could amend its complaint to substitute one or more governmental plaintiffs to pursue the UCL claims alleged in the complaint.

section 473 must be liberally construed to permit amendment to substitute a plaintiff with standing for one who is not a real party in interest." *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1005-1006 (emphasis added).

Numerous California courts of appeal have allowed the amendment of a complaint to substitute a new plaintiff where the original plaintiff lacks standing. *See, e.g., Haley, supra*, at 497; *Cloud, supra*; *Tenants Ass'n of Park Santa Anita v. Southers* (1990) 222 Cal.App.3d 1293. For example, in *Southers, supra* at 1304, the court determined that the plaintiff, a nonprofit association representing the interests of the tenants of the defendant's mobile home park, had standing to pursue some but not all of the claims asserted in the complaint. Thus, the court was faced with "how to address a complaint which is brought in a representative capacity when the association has standing to sue on some, but not all, the causes of action." *Ibid.* The court found the solution to be "apparent": "[l]eave should be granted to amend the complaint to add the individual past and present tenant members as plaintiffs" for those claims for which the association lacked standing. *Ibid.*[14] Thus, if the Court retroactively applies Proposition 64 to these cases, it must allow FATE to amend the complaints to add or substitute new plaintiffs that satisfy the new standing requirements.

B. Since Any Claims By Plaintiffs Added To FATE's Case Will Arise From The Same Set Of Facts As FATE's Original Complaint, Those Additional Plaintiffs' Claims Relate Back To The Original Filing Date.

As described above, any amendment to cure a deficiency in FATE's standing will substitute one or more individual residents, their family members or one or more governmental entities to pursue Defendants for the same staffing violations that have been at the heart of this case from the outset. Since this amended complaint will arise from the same set of facts as FATE's original complaint, the claims by any new plaintiffs who substitute in for FATE should relate back to the filing date of FATE's original complaint.

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[14] Professor Witkin has also acknowledged this as the proper solution: "A suit is sometimes brought by a plaintiff without the right or authority to sue, and the amendment seeks to substitute the real party in interest. Although the original complaint does not state a cause of action in the plaintiff, the amended complaint by the right party restates the identical cause of action, and amendment is freely allowed." 5 Witkin, Cal. Procedure, Pleading, § 1150, pp. 567-568.

An amended complaint will be deemed to relate back to the filing of the original complaint "provided recovery is sought in both pleadings on the ***same general set of facts.***" *Smeltzley v. Nicholson* (1977) 18 Cal. 3d 932, 936 (emphasis in original, quotations and citations omitted). This rule has been consistently applied to allow for the filing of an amended complaint replacing a plaintiff who lacks standing with a new plaintiff even after the statute of limitations would have otherwise run on the new plaintiff's claim. *See, e.g., Cloud, supra*; *Lamont v. Wolfe* (1983) 142 Cal.App.3d 375; *Jensen v. Royal Pools* (1975) 48 Cal.App.3d 717; *Olsen v. Lockheed* (1966) 237 Cal.App.2d 737.[15] For example, in *Jensen, supra*, at 720, the court held that the claims of individual condominium owners related back to the filing of the original complaint by the condominium association where the association was deemed to lack standing based on an intervening appellate decision. If the Court decides to apply Proposition 64 retroactively, this case will present the same situation as *Jensen*, since an intervening change in the law will have deprived FATE of standing to pursue its UCL claims.

Here, amended complaints substituting new plaintiffs to pursue FATE's UCL claims will arise from the precise same set of facts as FATE's original complaints. Those complaints put Defendants on notice that they were going to have to defend themselves against claims that they had understaffed their nursing homes since January 1, 2000, the date that Health & Safety Code §1276.5 became effective. In fact, FATE's UCL claims have always been brought in a representative capacity on behalf of the same individuals who may be substituting in as plaintiffs. The exact same evidence, facts and law will be at issue.

Since the claims will arise from the same set of facts, there will be no prejudice to Defendants if the claims of the new plaintiffs are deemed to relate back. On the other hand, if the claims of those plaintiffs are ***not*** allowed to relate back, the individual residents of Defendants' nursing homes, their family members and public prosecutors – who may have sat on their rights in reliance upon FATE's pursuit of their claims in a representative capacity – will be deprived of

[15] Professor Witkin has summarized the authorities as follows: "[T]he allowance of amendment and relation back to avoid the statute of limitations does not depend on whether the parties are technically or substantially changed; rather the inquiry is as to whether the nature of the action is substantially changed. And most of the changes in parties do not change the nature of the action." 5 Witkin, Cal. Procedure, *supra,* Pleading, § 1151.

their right to pursue restitution or civil penalties for time periods that are now beyond the statute of limitations of four years. To avoid this unjust result, the amended complaint should be deemed to relate back to March 18, 2003, the date of FATE's original complaint.[16]

C. If The Court Applies Proposition 64 Retroactively, Defendants Should Be Required To Notify The Individuals On Whose Behalf Those Claims Were Brought That Their Right To Recovery May Be Terminated.

As set forth above, if Proposition 64 is applied retroactively to deprive FATE of the ability to pursue representative UCL claims, granting FATE leave to amend and deeming the claims of any new plaintiffs to relate back to the filing of FATE's original complaint is necessary to protect the rights of the individuals on whose behalf FATE's UCL claims were brought. However, those protections will be meaningless if none of the individual residents or their family members are informed of this so that they come forward to act as named plaintiffs. Therefore, if the Court grants Defendants' motion, it should require Defendants to provide notice to the absent persons on whose behalf FATE's claims were brought.

Numerous courts have recognized the due process concerns raised by resolution of representative UCL cases brought on behalf of absent third parties. *See, e.g., Kraus, supra*, at 126; *Bronco Wine Co. v. Logoluso Farms* (1989) 214 Cal.App.3d 699, 718. In *Bronco Wine,* the court had awarded restitution on behalf of absent parties who were not notified of the judgment beforehand. Noting that some of those absent parties filed post-trial objections when they learned of the award, the Court held:

> This is precisely why due process demands that parties be given notice and an opportunity to be heard before judgment is entered for or against them. The nonparty growers had no opportunity to present their claims before the trial court by counsel of their own choice.

Id. at 718-719.

Similarly, in *Kraus, supra* at 138, the California Supreme Court specified the

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[16] For these same reasons, merely dismissing FATE's claims without prejudice – a result which Defendants may suggest – would not adequately protect the rights of these absent potential plaintiffs since such an outcome would not address the loss of relief for time periods that would not be covered by the statute of limitations for any newly filed case.

procedure to be followed to protect the due process rights of absent third parties in representative UCL cases. This procedure involves having the trial court order the defendant to "notify the absent persons on whose behalf the action is prosecuted of their right to make a claim for restitution, establish a reasonable time within which such claims must be made to the defendant, and retain jurisdiction to adjudicate any disputes over entitlement to and the amount of restitution to be paid." *Id.* at 138, n. 18.

The Court should follow the reasoning of *Bronco Wine* and *Kraus* by requiring Defendants to provide notice to the absent parties on whose behalf FATE's claims were brought of the dismissal (should the Court grant the MJOP) and of their right to assert their claims in an individual capacity. Absent such a procedure, the residents of Defendants' nursing homes, and those who paid for their care, may lose their right to recover restitution for significant periods of time that were covered by FATE's claims but that would now be outside the statute of limitations. At the very least, due process demands that they be given an opportunity to make that decision before their rights are terminated.[17]

CONCLUSION

Application of Proposition 64 here will have drastic retrospective effects on parties and non-parties alike. Moreover, such a sweeping change in policy as the elimination of the well-recognized private attorney general provision of the UCL may not be applied to any previously pending cases absent a clear statement of retroactive intent. Although the proponents of Proposition 64 could have easily included such a statement, they chose not to in order to insulate the measure from potential negative political repercussions. The voters cannot be presumed to have intended retroactive application of Proposition 64 where its proponents intentionally failed to inform them that the measure would apply to previously pending cases. For these, and all the above reasons, FATE respectfully requests that Defendants' motion for judgment on the pleadings be denied.

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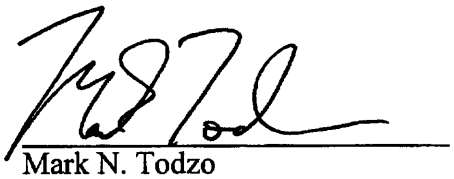
[17] Locating such individuals will not be difficult for Defendants, who must have records of who has stayed in their nursing homes over the past several years and who has paid for their care.

DATED: January 14, 2005

Respectfully Submitted,

LEXINGTON LAW GROUP, LLP



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FOUNDATION AIDING THE ELDERLY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

FOUNDATION AIDING THE ELDERLY, on behalf of the general public,

Plaintiff,

v.

COVENANT CARE CALIFORNIA, INC.; et al.

Defendants.

FOUNDATION AIDING THE ELDERLY, on behalf of the general public,

Plaintiff,

v.

EMBER CARE CORPORATION; et al.

Defendants.

FOUNDATION AIDING THE ELDERLY, on behalf of the general public,

Plaintiff,

v.

GRANCARE, LLC; et al.

Defendants.

Case No. RG03087211

PROOF OF SERVICE

ACTIONS FILED: March 18, 2003
July 8, 2003

TRIAL DATES: April 11, 2005
May 9, 2005
June 6, 2005

PROOF OF SERVICE

I declare that:

I am employed in San Francisco County, California. I am over the age of 18 years and not a party to the within cause; my business address is 1627 Irving Street, San Francisco, CA 94122.

On January 14, 2005, I served true copies of the following documents:

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO COVENANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

I arranged for personal hand delivery service to:

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And, in addition, I placed the envelope containing the above-mentioned document for collection and mailing on January 14, 2005, following the ordinary business practice:

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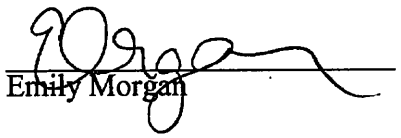
I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on January 14, 2005, at San Francisco, California.

Signed: 
Emily Morgan