IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

No. A109442

FOUNDATION AIDING THE ELDERLY,
On Behalf of the General Public,
Petitioner,
vs.
THE SUPERIOR COURT OF THE COUNTY OF ALAMEDA,
Respondent.

COVENANT CARE CALIFORNIA, INC., et al.,
Real Parties in Interest

On Petition for Writ of Mandate from the Alameda County Superior Court
The Honorable Ronald M. Sabraw
Superior Court No. RG0387211

REAL PARTY IN INTEREST'S OPPOSITION TO PETITION FOR WRIT OF MANDATE

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I. SUMMARY OF ARGUMENT

Largely glossing over the subject despite its threshold importance, FATE's discussion of why the writ should issue focuses on the purported correctness of FATE's legal position. (Petition, pp. 1-3.) FATE's poorly supported premise is that immediate appellate relief must be available here because the trial court's order has promptly generated undesirable consequences to FATE's ongoing litigation that are immediate and far-reaching.

As discussed below, Covenant Care respectfully submits that the trial court did not err in following the overwhelming weight of authority that has held that Proposition 64's amendments of the UCL are applicable to pending actions. (*See Frey v. Trans Union Corp.*, __Cal.App.4th__ (Mar. 24, 2005, G031928) [2005 Cal.App. LEXIS 401]; *Lytwyn v. Fry's Electronics, Inc.* (2005) 126 Cal.App.4th 1455; *Bivens v. Corel Corp.* (2005) 126 Cal.App.4th 1392; *Benson v. Kwikset Corp.* (2005) 126 Cal.App.4th 887; *Brannick v. Downey Sav. and Loans Ass'n* (2005) 126 Cal.App.4th 828; but *cf. Californians for Disability Rights v. Mervyn's, LLC* (2005) 126 Cal.App.4th 386 ("*Mervyn's*")(interlocutory order denying motion to dismiss appeal).)

However, even if this court were to conclude otherwise under its interlocutory holding in *Mervyn's*, this would still not justify issuance of extraordinary relief in the form of a peremptory writ at this time since a petition to review this court's *Mervyn's* decision was filed on March 14, 2005 and is currently pending before the Supreme Court. (Sup. Ct., Doc. No. S131798 .) A decision or order by this court in the present case directing the issuance of a peremptory writ in the first instance, without full briefing and hearing, would serve little practical utility here inasmuch as any such order or decision could not become final, nor could a writ of mandate issue more than a few days or weeks before final action must be taken by the Supreme Court on the *Mervyn's* petition for review. A decision by the Supreme Court to grant review in that case likely would immediately vitiate the basis for such an order. Furthermore, an order directing issuance of a peremptory writ of mandate without hearing at this time would compel Covenant Care to submit a duplicative petition for review to the Supreme Court concerning the very same issue as is already presented in *Mervyn's,* thus representing an unnecessary waste of judicial and litigant resources.

Therefore, FATE's petition should either be: (i) deferred pending further guidance from the Supreme Court in the form of a final decision

concerning the *Mervyn's* petition for review; (ii) set for hearing in the normal course through the issuance of an alternative writ of mandate and an opportunity of the parties to present oral argument; or (iii) denied because the decision in *Mervyn's* failed to properly apply Proposition 64 to pending UCL claims. If the court elects to follow either of the first two options and were the Supreme Court to act by granting review of the *Mervyn's* petition, the FATE petition for a writ of mandate should be summarily denied as failing to meet the standards for such relief.

II. STATEMENT OF FACTS

By verification, Covenant Care hereby alleges:

1. This action was filed in March 2003.

2. Plaintiff and petitioner FATE is a Sacramento-based non-profit corporation. FATE asserts three causes of action on behalf of the general public under the UCL (unlawful, fraudulent and unfair business practices) and one cause of action under Health and Safety Code section 1430 (based on alleged violations of Health and Safety Code section 1276.5). As a non-profit corporation, FATE concedes that neither it nor any of its members have ever resided in any of Covenant Care's nursing facilities, received any care from any of Covenant Care's staff, or evaluated or relied upon any of Covenant Care's advertisement.

3. Covenant Care operates skilled nursing facilities in various communities throughout California. As licensed skilled nursing facilities by the Department of Health Services, Covenant Care provides quality skilled nursing care and services to patients who need such care on an extended basis.

4. In the course of preparing its defense to FATE's meritless allegations, Covenant Care propounded discovery on FATE seeking the identity of persons who had allegedly suffered any harm as a result of Covenant Care's alleged wrongful conduct. After filing a motion to compel in response to FATE's evasive responses, the trial court ultimately found that FATE's responses were not in good faith and further found that FATE was not aware of any persons who had suffered any physical, emotional or psychological harm or injury as a result of Covenant Care's alleged wrongful conduct. Attached hereto as Exhibit "A" is a true accurate copy of the July 1, 2004 order issued by the trial court.

5. On November 2, 2004, the California voters approved Proposition 64 – "Limitation on Enforcement of Unfair Business Competition Laws," with the recognition that "[f]rivolous unfair competition lawsuits clog our courts and cost taxpayers," and with the explicit intent " . . . to eliminate frivolous unfair competition lawsuits" by " .

. . prohibiting private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (FATE's Exs. 5, p. 58.)

6. In response to Covenant Care's request to file a Motion for Judgment on Pleadings as to FATE's UCL claims, and recognizing the likely procedural effect of Proposition 64 on ongoing litigation, the trial court scheduled the matter for briefing and hearing on February 10, 2005.

7. FATE and Covenant Care filed briefs regarding Proposition 64's repeal of FATE's statutorily created standing to continue prosecuting its UCL claims. On February 1, 2005, the trial court issued a tentative ruling granting Covenant Care's Motion for Judgment on the Pleadings. On February 9, 2005, after Californians for Disability Rights was handed down, but before *Branick* and *Benson* respectfully demonstrated the *Mervyn's* court's erroneous application of the statutory repeal rule, the trial court issued a revised tentative ruling denying Covenant Care's motion. Oral argument was heard on February 10, 2005, after *Branick* and *Benson* were published.

8. On February 17, 2005, the trial court entered its order granting Covenant Care's Motion consistent with the principles articulated in *Branick* and *Benson*. The trial court did not dismiss FATE's fourth cause

of action under Health and Safety Code section 1430 because that claim is unaffected by Proposition 64.

9. In order to protect the claims FATE filed on behalf of the general public, the court ordered FATE to "provide the Attorney General and the Alameda County District Attorney with notice of this litigation on or before February 25, 2005." Pursuant to a request from the Attorney General, the court provided the Attorney General and the Alameda County District Attorney until May 6, 2005 to decide if the facts warrant intervention.

10. The trial court gave FATE permission to seek leave to amend to add new plaintiffs asserting UCL claims. In order to protect the identity of the residents for the purposes of the motion for leave, the court instructed FATE to redact the names of any residents who have allegedly suffered the requisite injury in fact and lost money or property. FATE is scheduled to file its motion on March 30, 2005 and the matter is scheduled for oral argument on April 26, 2005.

11. A petition to review this court's *Mervyn's* decision was filed on March 14, 2005 and is currently pending before the Supreme Court. (Sup. Ct., Doc. No. S131798 .) A decision or order by this court in the present case directing the issuance of a peremptory writ in the first instance,

without full briefing and hearing, would serve little practical utility here inasmuch as any such order or decision could not become final, nor could a writ of mandate issue more than a few days or weeks before final action must be taken by the Supreme Court on the *Mervyn's* petition for review.

III. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

A. WRIT REVIEW IS NOT APPROPRIATE AT THIS TIME

1. No Writ Should Issue Pending Further Guidance From The California Supreme Court in *Mervyn's*

A decision or order by this court directing the issuance of a peremptory writ in the first instance, without full briefing and hearing, would serve little practical utility inasmuch as any such order or decision could not become final, nor could a writ of mandate issue more than a few days or weeks before final action must be taken by the Supreme Court on the *Mervyn's* petition for review. A decision by the Supreme Court to grant review likely would immediately vitiate the basis for such an order. Deferring action on the present writ request would also conserve judicial and litigant resources by avoiding a potential need for the filing of a duplicative petition for review before the Supreme Court raising precisely

the same legal issue as are currently squarely before the Court in the *Mervyn's* petition.

The Supreme Court has stressed that use of the accelerated *"Palma"* procedure, involving an order directing issuance peremptory writ of mandate without affording litigants the opportunity to present normal briefing and oral argument, should be a "rarity." (*NG v. Superior Court* (1992) 4 Cal.4th 29, 35.) Furthermore, the Court has made clear that before the appellate court may direct that the peremptory writ issue in the first instance without hearing and oral argument, it must enter an order in writing with reasons stated. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 C.3d 171, 178, fn.6, *citing* Cal. Const., Art. VI, Sec.14.) The Court further noted that such an order is not final, nor should a writ of mandate issue until the passage of thirty (30) days in accordance with California Rules of Court, Rule 24, during which time the respondent may petition for review in the Supreme Court. (*Id.*, at 182.)

> A Court of Appeal lacks authority either to issue a peremptory writ without prior entry of an order directing its issuance or to make such an order final forthwith, thereby to permit the immediate issuance of the writ itself without opportunity for review of the order by this court. (*Palma, supra,* 36 Cal.3d at pp. 181-182, fn. omitted.) The writ itself may not be issued "before the judgment or order directing that it issue has been filed and *has become final*." (*Id.* at p.181,fn 9.)

(*NG, supra*, 4 Cal.4th at p. 34, emphasis added.)

Thus, a decision by the Court of Appeal here to issue an order directing the issuance of a peremptory writ in the first instance without hearing would not become final much before the time when the Supreme Court is expected to act with respect to the *Mervyn's* petition for review.[1] Therefore, an order or decision granting writ relief would be premature at this time since a decision by the Court to grant review in *Mervyn's* likely would immediately vitiate the basis for granting such relief.

2. Issuance Of A Peremptory Writ In The First Instance Would Be Inappropriate Given The Unsettled Principles Of Law Regarding The Effect of Proposition 64 On Pending Actions.

As previously noted, the Supreme Court has cautioned that use of the "rare" accelerated *Palma* procedure should be viewed as the "exception; it should not become routine." (*See NG, supra,* 4 Cal.4th at 35.) More specifically, issuance of a peremptory writ in the first instance (without an alternative writ) is reserved for exceptional situations where either (i) some "unusual urgency" justifies acceleration of the normal writ process or (ii) petitioner's entitlement to relief is "so obvious that no purpose could

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[1] Generally, the Supreme Court must decide to grant review withing 60 days of the filing of a petition for review. (CRC 28.2(b).) By order of the Court, the period may be extended a maximum of an additional 30 days. (*Id.*)

reasonably be served by plenary consideration of the issue" (e.g., when entitlement to relief is conceded or there has been clear error under well-settled principles of law and undisputed facts). *(Ibid.; see also Alexander v. Super. Ct.* (*Saheb*) (1993) 5 Cal.4th 1218, 1223.) If there is no compelling temporal urgency, and if the law and facts mandating the relief sought are not entirely clear, the normal writ procedure, including issuance of an alternative writ should be followed. (*Palma, supra*, 36 Cal.3d at pp. 177-178.)

In the instance of Proposition 64, there is no question that the development of the law is generally still in its infancy and that Proposition 64's application to cases pending on its effective date remains, as a result of the court's decision in *Mervyn's*, in a state of flux. Indeed, since publication of the decision in *Mervyn's*, five other District Court of Appeal decisions have been issued concerning Proposition 64's applicability to pending cases, and each of them has separately concluded that Proposition 64 does apply to all cases not yet final on appeal. (*See Branick v. Downey Savings & Loan Assn.*, supra; *Benson v. Kwikset Corp., supra*; *Bivens v. Corel Corp., supra*; *Lytwyn v. Fry's Electronics, Inc., supra*; *Frey v. Trans Union Corp., supra.*) Petitions for review have been filed before the Supreme Court in at lease three of these decisions. (*Mervyn's, supra*, Sup.

Ct., Doc. No. S131798; *Branick, supra*, Sup. Ct., Doc. No. S132433; *Benson, supra*, Sup. Ct., Doc. No. 132443.) Thus, in light of the circumstances, one cannot seriously contend that the law is "well-settled" as to the effect of Proposition 64 on pending actions as contemplated by *Palma* and its progeny.

Equally significant, Petitioner has failed to demonstrate any compelling temporal urgency that justifies accelerating the normal writ process. While FATE suggests that writ relief is necessary to avoid identifying patients, who have allegedly suffered harm as a result of Covenant Care's alleged wrongful conduct, as named plaintiffs in connection with its efforts to file an amended complaint, such an argument is disingenuous and cannot be squared with FATE's responses to Covenant Care's discovery. Specifically, in the course of preparing its defense to FATE's meritless allegations, Covenant Care propounded discovery on FATE seeking the identity of persons who had allegedly suffered any harm as a result of Covenant Care's alleged wrongful conduct. After filing a motion to compel in response to FATE's evasive responses, the trial court ultimately found that FATE's responses were not in good faith and further found that FATE was not aware of any persons who had suffered any physical, emotional or psychological harm or injury as a result of Covenant

Care's alleged wrongful conduct. (*See* Exhibit A, p.1, ln. 17-19.) Furthermore, in order to protect the identity of the residents for the purposes of the motion for leave, the court instructed FATE to redact the names of any residents who have allegedly suffered the requisite injury in fact and lost money or property.

In light of the absence of the requisite "well-settled principles of law," the imminent action expected from the Supreme Court regarding the petitions for review in *Mervyn's*, *Branick* and *Benson*, and Petitioner's failure to explain adequately how the trial court's ruling has created any truthful temporal "urgency," the present petition simply does not meet the Supreme Court's *Palma* standards for such exceptional relief. While Covenant Care maintains that writ relief is inappropriate in any form, issuance of a peremptory writ in the first instance is clearly not warranted at this time.

B. **PROPOSITION 64 APPLIES TO ALL PENDING UCL CLAIMS**

Covenant Care respectfully submits that the trial court did not err in following the overwhelming weight of authority that has held that Proposition 64's amendments of the UCL are applicable to pending actions. As a general principle, if a lower court decision can be affirmed on any

legal grounds, even if based upon an erroneous legal theory, it should be affirmed. (*See Scharbarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1217.)

1. This Court's Order In *Mervyn's* Failed to Properly Apply the Statutory Repeal Rule

The *Mervyn's* court noted that *Landgraf v. US Film Products* (1994) 511 U.S. 244 [114 S.Ct. 1483, 128 L.Ed.2d 229] ("*Landgraf*") "provided a reconciliation" of the "seeming conflict" between the statutory repeal rule and the analysis of retroactive or prospective application of a law by explaining that "the presumption of prospectivity is the controlling principle." (*Mervyn's*, supra, 126 Cal.App.4th at p. 395, citing *Landgraf, supra*, 511 U.S. at pp. 263-280.) Covenant Care respectfully submits that such a determination is erroneous as it ignores well-established principles of California law and significantly misconstrues the U.S. Supreme Court's decision on *Landgraf* and the California's Supreme Court's decision in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 ("*Evangelatos*").

Under California law, as the First District Court of Appeal and many other courts have specifically recognized, the repeal of a statutory right or remedy presents entirely distinct issues from that of the prospective or retroactive application of a statute. (*See Physicians Comm. For*

Responsible Medicine v. Tyson Foods, Inc. (2004) 119 Cal.App.4th 120, 125; *Northern California Carpenters Regional Council v. Warmington Hercules Assocs.* (2004) 124 Cal.App.4th 296, 302.) Similarly, Witkin explains that, "[a]n exception to the rule of prospective construction is recognized where a right of action is created by statute and the statute is repealed without a saving clause: The repeal will operate retroactively to terminate a pending action based on the statute." (7B. WITKIN, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 497, p. 690-691.) As noted by the California Supreme Court, "[a]ll statutory remedies are pursued with the full realization that the legislature may abolish the right to recover at any time." (*Governing Bd. of Rialto Unified School Dist. v. Mann* (1977) 18 Cal.3d 819, 829 ("*Mann*"); see also *Lytwyn*, supra, at p. 1478; *Bivens*, supra, at p. 1403; *Benson*, supra, at pp. 901-902; *Branick*, supra, at p. 841.)

As opposed to statutes that affect common law rights such as the initiative affecting the "traditional, common law `joint and several liability' doctrine" in *Evangelatos*, or impose greater liabilities on acts that have already occurred and therefore present due process and *ex post facto* issues

as in *Myers v. Phillip Morris Cos., Inc.* (2002) 28 Cal.4th 828[2], the statutory repeal rule is based on the principle that if a right or remedy is created by a statute, it can also be destroyed by a repeal of that statute. It is for this reason that the Supreme Court's decision in *Younger v. Superior Court* (1978) 21 Cal.3d 102 ("*Younger*") made no mention of whether the law was to be applied prospectively or retrospectively and why the Supreme Court in *Mann* flatly rejected the principle that statutory enactments are presumed to have a prospective effect. Specifically, in *Mann*, in response to the plaintiff's attempt to invoke the presumption that statutory enactments are interpreted prospectively, the Court noted that "[a] long well-established line of California decisions [applying the statutory repeal rule] conclusively refutes plaintiff's contention." (*Mann, supra*, 18 Cal.3d at p. 829.) Continuing, the Supreme Court observed that "[a]lthough the

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[2]Contrary to FATE's assertion, rather than reject or alter the statutory repeal argument, *Myers* dealt with the distinct situation where a statute changed the legal consequences of a party's past conduct. In *Myers*, the repeal of the statute did not abrogate the right to bring a cause of action, rather it changed the consequences of the conduct upon which the cause of action was based. (*See Myers, supra*, 28 Cal.4th at 839 citing *Landgraf, supra*, 511 U.S. at 280 ("a statute that operates to 'increase a party's liability for past conduct' is retroactive").) Simply put, in those instances where the past conduct which is the basis of the cause of action, is being assigned new or different liabilities but the statutorily granted right to bring the cause of action is not being repealed, the statutory repeal rule is simply not applicable.

courts normally construe statutes to operate prospectively, the courts correlatively hold under the common law that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, `a repeal of [the] statute without a saving clause will terminate all pending actions based thereon.'" (*Ibid.*, quoting *Southern Service Co., Ltd. v. County of Los Angeles* (1940) 15 Cal.2d 1, 11-12.)[3]

Further, the statutory repeal rule has been applied broadly by California courts. The statutory repeal rule has been applied to civil statutes[4], statues governing private parties as well as statutes regulating government conduct[5], statutes that are "penal" as well as "remedial" in nature[6], measures enacted by both the electorate and legislature[7], and it has

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[3]While FATE has creatively argued that *Mann* and *Younger* support the argument that the statutory repeal rule is merely an application of the presumption that laws are applied prospectively, the language of the cases as well as the overwhelming weight of authority reject this proposition.

[4]*See, e.g., Mann,supra,* 18 Cal.3d at 830 ("The reach of this common law rule has never been confined solely to criminal or quasi-criminal matters.")

[5]*See, e.g., Physicians Comm. V. Tyson Foods*, 119 Cal.App. 4th at 127 (applying repeal rule to anti-SLAPP statute).

[6]A statute is "remedial" if its purpose is to redress individual wrongs, and it is "penal" if its purpose is to deter public wrongs. *Bracken v. Harris & Zide, LLP,*219 F.R.D. 481, 483-485 (N.D. Cal. 2004). While the term "special remedial statute" appears in *some* cases applying the repeal rule (*see, e.g., Southern Services Col, Ltd. v. Los Angeles,* 15 Cal.2d 1, 12 (1940) there is no requirement that the statute subject to this rule be

been applied to statutes that terminate entire causes of action so as to eliminate a defendant's liability[8]. The California Supreme Court has even applied the statutory repeal rule specifically to statutory unfair competition law.[9]

As recently confirmed by *Branick, Benson, Bivens, Lytwyn,* and *Frey*, the statutory repeal rule is an independent concept that compels theapplication of Proposition 64 to pending UCL actions brought by

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remedial. *See, e.g., Lemon v. Los Angeles Terminal Ry. Co.,* 38 Cal.App.2d 659, 670, 671 (1940) ("This right of action was a right unknown to the common law and is predicated solely upon the statutes involved. Whether the statute be construed as remedial or penal in character, it follows that the repeal of the statute before the securing of a final judgment extinguished the cause of action"; "it has been held in a long line of cases that the repeal of a statute creating a penalty, running to either an individual or the state, at any time before final judgment, extinguishes the right to recover the penalty. The same rule applies to remedial statutes unknown to the common law.").

[7]*See, e.g. Chapman v. Farr,* (1982) 132 Cal.App. 3d 1021, 1023 (applying repeal rule to Constitutional referendum).

[8]*See, e.g., Chapman,* 132 Cal.App. 3d at 1025 (applying repeal rule to referendum changing scope of usury laws to insulate defendant from all liability).

[9]*See International Ass'n of Cleaning & Dye House Workers v. Landowitz,* 20 Cal.2d 418, 422 (1942) (holding that the cause of action under the predecessor to the unfair competition law was vitiated by the Legislature's repeal of the statute that created it; "The repeal of Act 8784 in 1941, however, constituted a withdrawal of the statutory authority upon which this equitable cause of action was based. Where a statutory remedy is repealed without a savings clause and where no rights have vested under the statute, it is established that the right to maintain an action based thereon is terminated.").

uninjured plaintiffs.

a. Neither *Landgraf* Nor *Evangelatos* Support The Proposition That The Statutory Repeal Rule Is A Mere Application of the Presumption That Statutes Are Applied Prospectively

As previously mentioned, numerous cases, in various contexts, old and new, clearly support the proposition that the statutory repeal rule is distinct from the analysis of prospective or retrospective application of the law. Insofar as the *Mervyn's* court relied on *Evangelatos* and *Landgraf*, such reliance is misplaced as neither decision implicated, let alone overruled, California's statutory repeal rule.

(1) *Landgraf* does not Support the Proposition that the Statutory Repeal Rule is a Mere Application of the Presumption that Statutes are Applied Prospectively

Covenant Care respectfully contends that the *Mervyn's* court's use of the U.S. Supreme Court's decision in *Landgraf* to justify eviscerating the statutory repeal rule was based on a misreading of *Landgraf*. In fact, *Landgraf* did not implicate the statutory repeal rule and in no way supports the proposition that the statutory repeal rule is a mere application of the presumption that statutes are applied prospectively. The U.S. Supreme

Court had no reason to address the relationship of these two principles since the statutory repeal rule does not apply to federal statutes. As the Fourth Circuit explained, the "General Savings Statute, 1 U.S.C. § 109 . . . abolishes the common-law rule that repeal or amendment of a statute nullifies the old version of the statute as to pending proceedings. It does so by providing that, unless Congress declares otherwise, a liability that arises under a later-repealed statute is preserved despite repeal and may be enforced by a post-repeal action . . . " (*Korshin v. Comr.* (4th Cir. 1996) 91 F.3d 670, 673, internal citation omitted; see *Fujitsu Ltd. v. Fed. Express Corp.* (2d Cir. 2001) 247 F.3d 423, 432 ("This provision operates to preserve both civil and criminal statutory liabilities"), cert. den. (2001) 534 U.S. 891 [122 S.Ct. 206, 151 L.Ed.2d 146].)

While *Landgraf* mentioned the statutory repeal rule, it did so only in passing, noting that while the presumption against statutory retroactivity has been explained by reference to the unfairness of imposing new burdens, "at common law a contrary rule applied to statutes that merely removed a burden on private rights by repealing a penal provision (whether criminal or civil); such repeals were understood to preclude punishment for acts antedating the repeal." (*Landgraf, supra*, 511 U.S. at pp. 270-271.) However, the Supreme Court then specifically recognized that it no longer

had to deal with this issue by adding the following citation: "But see 1 U.S.C. § 109 (repealing common-law rule)."(*Id.* at 271.) Contrary to Congress' explicit abolition of the statutory repeal rule, the California Legislature expressly codified the statutory repeal rule by stating that "[a]ny 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." (Gov. Code, § 9606.)

(2) *Evangelatos* does not Support the Proposition that the Statutory Repeal Rule is a Mere Application of the Presumption that Statutes are Applied Prospectively

Similarly, the *Mervyn's* court's reliance upon *Evangelatos* is misplaced as the California Supreme Court in *Evangelatos* did not even mention the statutory repeal rule, much less apply it, analyze it or modify it. As the statutory repeal rule only applies to the repeal of rights solely dependent on statute, as opposed to the modification of "long-standing common law rights" at issue in *Evangelatos*, the Supreme Court's silence is wholly understandable. (*Evangelatos, supra,* 44 Cal.3d at pp. 1192, 1225; *Lytwyn, supra,* at p. 1480, fn. 13; *Bivens, supra,* at p. 1404; *Benson, supra,* at pp. 841-842; *Branick, supra,* at pp. 906-907.)

The *Mervyn's* court's interpretation of *Evangelatos* -- as explaining

that "cases applying the repeal or amendment of statutes retroactively do not displace the general principle of prospectivity applicable to all legislation" (*Mervyn's, supra,* 126 Cal.App.4th at p. 395) -- is without support as the cases discussed in *Evangelatos,* similar to *Evangelatos* itself, do not even mention the statutory repeal rule. (*Evangelatos, supra, 44* Cal.3d at *pp. 1222-1225;* see *Stout v. Turney* (1978) *22* Cal.3d 718; *Feckenscher v. Gamble* (1938) 12 Cal.2d 482; *Tulley v. Tranor* (1878) 53 Cal. 274.) In these cases, the Court was not concerned with whether the legislature intended the statute apply prospectively or retrospectively as "the language of the statute in question showed that the Legislature intended the measure to be applied retroactively." (*Evangelatos, supra,* 44 Cal.3d at p. 1223, citation and quotation marks omitted; see *Mervyn's, supra,* 126 Cal.App.4th at pp. 395-396.) Rather, the Court was concerned with the constitutional question of whether "whether the Legislature has power to give those laws such retroactive effect." (*Evangelatos, supra,* 44 Cal.3d at p. 1223.) In contrast, as the Supreme Court acknowledged in *Mann*, there is no question regarding the constitutionality of the principle that if a right or remedy is created by a statute, it can also be destroyed by a repeal of that statute. *(Mann, supra,* 18 Cal.3d at p. 829; Gov. Code, § 9606; see *Mervyn's, supra,* 126 Cal.App.4th at pp. 395-396.) Thus, the cases

discussed in *Evangelatos* are dealing with principles quite distinct from the statutory repeal rule.

2. **Consistent With The Result Reached By The Trial Court, Proper Application Of The Statutory Repeal Rule Requires Dismissal Of FATE's UCL Causes Of Action Brought On Behalf Of The General Public**

Pursuant to California law, when a pending action rests solely on a statutory basis, a repeal of such statute without a savings clause will terminate all pending actions based thereon. (*See Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 690; *Physicians Committee For Responsible Medicine v. Tyson Foods, Inc., supra,* 119 Cal.App.4th 120; *Northern California Carpenters Regional Council v. Warmington, supra,* 124 Cal.App.4th 296.) In each of these cases (which were decided in 2004) and in countless prior cases, the courts have consistently held that unless a statutory cause of action has been reduced to a final judgment, a plaintiff's continuing right to maintain it is destroyed when the cause of action is withdrawn by repeal or amendment. (*See Younger, supra,* 21 Cal.3d at109; *Traub v. Edwards* (1940) 102 p.2d 463; *Krause v. Rarity* (1930) 210 Cal. 644, 652-53.)

a. Proposition 64 Repealed The Sole Statutory Remedy FATE Relies Upon To Pursue Its UCL Claims, and It Does Not Contain A "Savings Clause"

In the matter at hand, FATE's First Amended Complaint demonstrates that it is predicated upon the private attorney general provisions of the UCL as it has suffered no personal injury, lost no money or property, and lacks any connection to Defendants' business practices. (See FATE's Exs. 1, p. 1-20.) As Proposition 64 repealed that portion of the UCL that had granted standing to FATE, and did not include a savings clause, FATE does not have a continuing right to maintain this action.

Such a result is only logical. Were it otherwise, the Court of Appeal could agree with *Mervyn's* on the merits of the appeal and remand the case to the trial court, at which point the trial court would be faced with the prospect of potentially issuing injunctive relief in favor of a party that lacks the jurisdictional basis to maintain the underlying action. Such a situation was described by the court in *Benson* as "absurd," and contrary to what the electorate could have intended. *(Benson, supra,* at p. 907.)

b. Proposition 64 Effectuated A Repeal Of FATE's Statutory Right To Bring A Representative Claim Under The UCL

FATE's contention that as Proposition 64 is not a "true 'repeal'

provision" as it does not "repeal any UCL cause of action or remedy" is totally without merit. (*See Petition* p. 12, ln. 5-12.) Whether a legislative act wholly repeals, partially repeals, or amends a statutory right to bring a cause of action, the court is to apply the law in force at the time of the judgment. (*See Brenton v. Metabolife Int'l, Inc, supra,* 116 Cal.App. 4th at 690; *Lemon v. Los Angeles Terminal Ry. Co.*, supra, 38 Cal.App.2d 659; *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 488-489; *South Coast Regional Com. v. Gordon* (1978) 84 Cal.App.3d 612, 619-620; *Chapman v. Farr* (1982) 132 Cal.App.3d 1021, 1023-1025.) Dealing with a similar argument in *Brenton* that a statutory change did not amend or repeal the particular section upon which a party relied for his/her cause of action, the court rejected such argument noting that even a new statute containing no reference to the existing statute can effect a partial repeal. (*See Brenton v. Metabolife Int'l, Inc., supra*, 116 Cal.App.4th at 690 citing *Mann, supra,* 18 Cal.3d at 825.) In *Brenton*, as in this matter, the court was not generally stripped of its power to hear a particular type of claim, rather, the amendment as here excepted certain claims from applicability of the statutorily conferred remedy.

3. Proposition 64 Made Only Procedural Changes And Thus Is Properly Applied To Pending Cases

The *Mervyn's* court rejected the defendant's argument that Proposition 64 established new procedural rules that are properly applied to all pending cases. Indeed, the *Mervyn's* court held that the relevant question is not "whether a procedural or substantive label best applies" but "the effect on the parties rights." (*Mervyn's*, *supra*, 126 Cal.App.4th at p. 396.) In so concluding, the *Mervyn's* court commented that "[a]pplication of Proposition 64 to cases filed before the initiative's effective date would deny parties fair notice and defeat their reliance on settled expectations."(*Id.* at p. 397.)

The *Mervyn's* court mistakenly treated Proposition 64's effects on ongoing litigation as if they were the equivalent to effects on past conduct. Under applicable California law, the analysis of whether a new statute applies to pending suits is focused upon the effect it ascribes to past conduct and not to the effect it ascribes to ongoing litigation. (*Myers, supra,* 18 Cal.3d at 839 citing *Landgraf, supra*, 511 U.S. at 280 ("retroactive or retrospective law 'is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute"); *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388

(operation would be retroactive, since it imposes new or additional liability for workers compensation injuries that occurred before the date the statute was enacted); *Evangelatos, supra,* 44 Cal.3d at 1206 (operation would be retroactive as it would impose new limits on a joint tortfeasors liability for noneconomic damages for injuries that occurred before the statute was enacted).)

Whether committed before or after Proposition 64's passage, an unlawful, unfair, or fraudulent business act or practice remains actionable by plaintiffs that have standing, and the business that committed that act or practice is still subject to liability for injunctive and/or restitutionary relief under Section 17203. Proposition 64 does not impose any new or different liabilities based on any parties' past conduct as Proposition 64 does not change the substantive, predicate statutes "borrowed" by plaintiffs in UCL actions. In the matter at hand, Health & Safety Code §1276.5, remains in full force and effect, completely unchanged by the passage of Proposition 64. Instead, Proposition 64 merely adds a "procedural screening mechanism," thus destroying the right of an uninjured party, such as FATE, to pursue a UCL action, representative or otherwise, based on the applicable staffing rules. (*See Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 356 (a lack of standing destroys the UCL claim).)

The *Mervyn's* court's analysis is flawed in that statutorily created remedies are pursued with the full realization that the Legislature may abolish them at any time. (*See Callet v. Alioto* (1930) 210 Cal. 65, 67-68; *see also* Government Code §9606 ("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."); *People v. Bradley* (1998) 64 Cal.App.4th 386.) Further, FATE cannot assert the existence of a vested right as courts consistently hold that a "statutory remedy does not vest until final judgment." (*County of San Bernardino v. Ranger Ins. Co.* (1995) 34 Cal.App.4th 1140, 1149 quoting *South Coast Regional Com. v. Gordon* (1978) 84 Cal.App.3d 612, 618; *Graczyk v. Workers' Comp Appeals Bd.* (1986) 184 Cal.App.3d 997, 1006-07 (applicant did not have a vested right as his claims were wholly statutory and had not been reduced to a final judgment).)

Moreover, it is well settled that standing is generally viewed as a procedural matter, as opposed to a substantive right. Under California law, standing is so clearly a procedural issue that most courts refer to it in passing as a procedural requirement. (*See Casa Herrera, Inc. V. Beydoun* (2004) 32 Cal.4th 336, 348; *Coral Const., Inc. v. City and County of San Francisco* (2004) 116 Cal.App.4th 6, 15, n.10.) This is primarily based on

the reasoning that a party's standing impacts the issue of whether a cause action can be maintained and does not reflect the merits of the action. (*See Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605; *Parsons v. Tickner,* (1995) 31 Cal.App.4th 1513, 1523; *Nathanson v. Hecker* (2002) 99 Cal. App.4th 1158, 1163; *J & K Painting Co. v. Bradshaw* (1996) 45 Cal.App.4th 1394, 1402, n.8; *Saks v.Damon Raike & Co.* (1992) 7 Cal.App.4th 419, 430.)

As Proposition 64 does not change the effects of past conduct, and as FATE has no vested right in a statutorily created cause of action, application of Proposition 64 to its pending UCL causes of action is appropriate as the change is procedural in nature.

IV. CONCLUSION

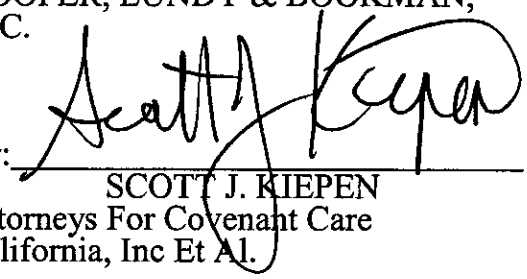
For the foregoing reasons, FATE's petition should either be: (i) deferred pending further guidance from the Supreme Court in the form of a final decision concerning the *Mervyn's* petition for review; (ii) set for hearing in the normal course through the issuance of an alternative writ of mandate and an opportunity of the parties to present oral argument; or (iii) denied because the decision in *Mervyn's* failed to properly apply Proposition 64 to pending UCL claims. If the court elects to follow either of the first two options and were the Supreme Court to act by granting

review of the *Mervyn's* petition, the FATE petition for a writ of mandate should be summarily denied as failing to meet the standards for such relief.

Dated: March 28, 2005

Respectfully submitted,

HOOPER, LUNDY & BOOKMAN, INC.



By: _____
SCOTT J. KIEPEN
Attorneys For Covenant Care California, Inc Et Al.

VERIFICATION

I, Scott J. Kiepen, am an attorney with Hooper, Lundy & Bookman, Inc., counsel for Defendant and real party in interest Covenant Care California, Inc. et al ("Covenant Care"). I am making this verification as Covenant Care's counsel because I am more familiar with the relevant facts. The facts referred to in Covenant Care's Opposition to Writ of Mandate are true based on my personal knowledge from my review of the files in this case.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 28th day of March, 2005.

DATED: March 28, 2005

HOOPER, LUNDY & BOOKMAN, INC.

By: _____
SCOTT J. KIEPEN
Attorneys For Covenant Care California, Inc., Et Al.

RULE 14(C) CERTIFICATE OF PROOF OF COMPLIANCE

The undersigned certifies that the **OPPOSITION TO PETITION OF WRIT OF MANDATE AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES** uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this brief comprises less than 6,295 words according to the word count provided by Corel WordPerfect word-processing software.

DATED: March 29, 2005

Matthew Clark

MATTHEW CLARK
Counsel for Real Party of Interest

EXHIBIT A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

ENDORSED
FILED
ALAMEDA COUNTY

JUL 0 1 2004

CLERK OF THE SUPERIOR COURT
By CHARLOTTE MARIN
Deputy

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

Plaintiffs,

vs.

COVENANT CARE CALIFORNIA, INC., et al.,

Defendants.

Case No. RG03087211

ORDER GRANTING IN PART AND DENYING IN PART THE MOTION FOR SANCTIONS

The Motion of Covenant Care for sanctions is GRANTED in part and DENIED in part.

Covenant Care served discovery on FATE seeking the identity of persons who had been injured by its alleged violations of Health and Safety Code § 1276.5. Plaintiff objected on various grounds and Covenant Care brought a motion to compel responses. The Court ordered FATE to provide the identity of persons who had been injured by Covenant Care's alleged violations. FATE then served Amended Supplemental Responses to Special Interrogatories 31-33. FATE's Amended Supplemental Responses did not specifically identify any person who suffered harm or injury and went on to state all residents at Covenant Care facilities have suffered harm or injury.

As noted during the hearing on these motions, the Court finds that the Amended Supplemental Responses of FATE were not in good faith. FATE argues, inter alia, that Special Interrogatories 31-33 were vague and ambiguous. The Court acknowledged at the hearing that the interrogatories did not specify or define the phrase "harmed or injured" and that such phraseology reasonably includes the full spectrum of physical, emotional, psychological or economic harm or injury. What is not ambiguous is that the defendants were clearly seeking the identity of each and every person known to FATE who suffered harm or injury. FATE's understanding of

Covenant's request for the identity of persons known to FATE to have suffered "injury or harm" is best illustrated by FATE's meet and confer letter of December 8, 2003 where Mr. Todzo argues that the identity of FATE's clients cannot be disclosed because FATE owes a duty of confidentiality to its clients and asserts that persons who have provided information to FATE do so only on condition of anonymity. These arguments were made by FATE at the April 13, 2004 hearing on Covenant Care's Motion to Compel. Notwithstanding these arguments, the Court ordered FATE to provide further answers to Covenant Care's interrogatories.

Based on the amended and supplemental responses of FATE, the Court finds that FATE is not aware of any persons who have suffered any physical, emotional or psychological harm or injury. FATE may, and does, assert that all residents who have paid for their care at of any the Covenant Care facilities have suffered economic harm or injury based upon their not having received the full value of services required under Health and Safety Code § 1276.5.

The request for monetary sanctions is GRANTED. The Court has read and considered the Declaration of Pamela K. Riley in support of Covenant Care's Motion for Sanctions. While Ms. Riley's Declaration itemizes fees incurred on the present issue concerning FATE's responses to Special Interrogatories 31-33, the Court finds the reasonable attorney fees incurred in compelling further responses to such Special Interrogatories is $7,500.00. Therefore, the Court orders that Plaintiff FATE shall pay to Covenant Care the total sum of $7,500.00 for its failure to provide good faith answers. However, the Court hereby stays the enforcement of this order until the conclusion of this litigation. The attorney fees awarded herein shall be in addition to any additional attorney fees to which Covenant Care may be entitled in the event that Covenant Care is the prevailing party in this litigation. In the event that Plaintiff is the prevailing party, the fees herein awarded to Covenant Care may be a credit or offset against attorney fees and or costs awarded to Plaintiff.

The request for issue sanctions is DENIED. The Tentative Ruling in this matter contemplated an issue sanction against Plaintiff that would preclude Plaintiff at trial from claiming, asserting, or offering any evidence that any person residing in any Covenant Care facility suffered any

physical, emotional, or psychological harm or injury in support of any claim for restitution or damages. The Court was prepared to allow FATE to continue to assert and offer evidence that residents of the Covenant Care facilities suffered economic harm or injury in support of its claim for restitution or damages as a result of Covenant Care's alleged violation of Health and Safety Code § 1276.5. In response to the Court's Tentative Ruling on issue sanctions, Plaintiff argued that Covenant Care continues to assert a quality of care defense. Under these circumstances, the issue sanction contemplated by the Court might put Covenant Care in a better position than it would have been had FATE provided complete answers to Special Interrogatories 31-33. This result would occur because FATE would be precluded by virtue of the issue sanction from challenging Covenant Care's quality of care defense by producing evidence at trial that quality of care was impacted by violation of the 3.2 standard. While there is presently no evidence that any resident of a Covenant Care facility has suffered any physical, emotional or psychological harm or injury, as Plaintiff points out, discovery is not over and Plaintiff's may yet discover such evidence. Such a result would run afoul of ***In re Marriage of Chakko*** (2004) 115 Cal. App. 4th 104. Thus, the Court concludes that in light of Covenant Care's continued assertion of a quality of care defense, the Court finds its proposed issue sanction inappropriate under these unique circumstances.

IT IS SO ORDERED.

JUL 01 2004

Dated: June ___, 2004

Judge Ronald M. Sabraw

(RCD-11/00)

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to this cause. I served a copy of the Order Granting in Part and Denying in Part the Motion for Sanctions by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States Mail at Alameda County, California, following standard court practices.

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Dated: July 1, 2004

ARTHUR SIMS
Executive Officer/Clerk of the Superior Court

By _____
Charlotte Marin, Clerk of Dept. 22

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 180 Montgomery Street, Suite 1000, San Francisco, California 94104.

2. That on March 28, 2005, declarant served the **OPPOSITION TO PETITION OF WRIT OF MANDATE AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES** by depositing a true copy thereof in a United States mailbox at San Francisco, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of March, 2005, at San Francisco, California.

Angelique Pierre

Angelique Pierre

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