IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELATE DISTRICT

DIVISION ____

MICHAEL GNESDA, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, SOUTHEAST JUDICIAL DISTRICT, Respondent. UNITED PARCEL SERVICE, INC., an Ohio corporation; UPS GENERAL SERVICES, INC., a Delaware corporation, Real Parties in Interest/Defendants.	)	Civil No. B181004 Los Angeles Superior Court Case No. VC039590 Hon. Peter Espinoza Action Filed: March 26, 2003

PETITION FOR PEREMPTORY WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF
[APPENDIX OF EXHIBITS FILED SEPARATELY]

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TO: THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT:

INTRODUCTION

Petitioner Michael Gnesda (Gnesda), like many litigants in California, recently lost his cause of action for unfair competition due to retroactive application of Proposition 64. Gnesda had accused Real Parties in Interest United Parcel Service, Inc. and UPS General Services, Inc. (collectively, UPS) of systematically overcharging customers on the shipment of irregular or oversized packages. Gnesda filed his representative action on March 26, 2003.

Nearly two years later, the trial court dismissed the unfair competition claim on grounds Gnesda did not meet the standing requirements of Proposition 64, which took effect November 3, 2004. The trial court did recognize in its order that whether Proposition 64 should apply here was "a controlling question of law concerning which there are substantial grounds for difference of opinion." Order Granting Defendants' Motion For Judgment on the Pleadings As To The Plaintiff's Fourth Cause of Action For Violations of California Business and Professions Code Sections 17200, 17203 and 17204, filed January 24, 2005.

Gnesda strongly believes that the trial court erred. Indeed, the First Appellate District just published an opinion denying a motion to dismiss an appeal on grounds Proposition 64 only applies to lawsuits filed after November 3, 2004. Californians For Disability Rights v. Mervyn's LLC, __ Cal.App.4th __, 2005 DJDAR 1347 (Feb. 1, 2005). Proposition 64 cases are pending in other appellate districts as well. See, http://www.17200blog.com/Prop64Appeals for a list of pending cases. The Supreme Court may soon decide the issue in Virtual Media Group V. S.C. (Regency Outdoor Advertising), Case No. S129816 (time to grant or deny review extended to March 8, 2005).

Until Proposition 64's reach is finally decided by the California Supreme Court, this court has an obligation to correct clearly erroneous decisions. In this regard, the trial court here ignored long-standing legal principles, set forth in both the California and United States Supreme Courts, holding that a new statute is presumed to operate prospectively absent an express declaration or a clear intent by the electorate, or the Legislature, to the contrary. Tapia v. Superior Court (1991) 53 Cal.3d 282, 287; Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, 1214 (Prop. 51 prospective); Landgraf v. USI Film Prods., 511 U.S. 244 (1994); Lindh v. Murphy, 521 U.S. 320 (1997) (new rules governing habeus corpus petitions in the Antiterrorism and Effective Death Penalty Act of 1996 applied prospectively).

Since the presumption in favor of prospective application "embodies a legal doctrine older than our Republic," Landraf, supra, 511 U.S. at 265, and since the electorate did not express an intent to apply Proposition 64 to pending cases, the trial court's dismissal of Gnesda's Fourth Cause of Action should be reversed with directions to reinstate the cause of action.

Writ relief is necessary and appropriate in this instance because the issue presented is purely one of law, there is no further opportunity to review the lower court's error before or during trial, and Gnesda will suffer irreparable harm if he must wait to appeal the final judgment and retry the case if the decision is reversed on appeal. The irreparable harm will involve difficulty in locating witnesses, the loss of memory, the possible destruction of documents supporting the claim, and other evidentiary and proof issues occasioned by delay. Finally, writ relief in necessary to correct a clearly erroneous decision that could affect thousands of pending cases across the state.

PETITION

Petitioner Michael Gnesda respectfully petitions this court for a peremptory writ of mandate directing Respondent Superior Court of the State of California for the County of Los Angeles, Southeast Judicial District, to set aside its Order Granting Defendants' Motion For Judgment on the Pleadings As To The Plaintiff's Fourth Cause of Action For Violations of California Business and Professions Code Sections 17200, 17203 and 17204, filed January 24, 2005, and enter a new and different order denying the motion and by this verified petition allege:

1. Petitioner is the plaintiff in a lawsuit entitled Michael Gnesda v. United Parcel Service, Inc., an Ohio corporation; UPS General Services, Inc., a Delaware corporation, Los Angeles Superior Court Case No. VC039490.

2. Gnesda was employed by UPS in various capacities from 1985 through March 2002. UPS terminated Gnesda in March 2002 for allegedly authorizing a change in a driver's return to building time. In his lawsuit, Gnesda claims that the reason given by UPS for his termination was pretextual, and that the real reason was due to complaints Gnesda made to management about UPS billing practices. Specifically, Gnesda complained that oversized and irregularly shaped packages were not being properly measured in violation of published tariffs and internal policies of UPS, resulting in millions of dollars of overcharges to UPS customers. Exhibit A at App. 004-006.

3. Gnesda did not seek class certification of his UCL claim.

4. On November 2, 2004, the California electorate passed Proposition 64 which imposed strict standing requirements for private UCL claims. Under Proposition 64, a private person may pursue claims on behalf of others or the general public if the claimant suffered an injury in fact as a result of the challenged business practice and meets the requirements for a class representative.

5. Based on passage of Proposition 64, on December 8, 2004, UPS filed a Motion For Judgment on the Pleadings As To The Plaintiff's Fourth Cause of Action For

Violations of California Business and Professions Code Sections 17200, 17203 and 17204, arguing that the law applied to all pending cases, including Gnesda's. Exhibit B. As part of the motion, UPS requested the court to take judicial notice of the official text of Proposition 64. Exhibit C.

6. On December 17, 2004, Gnesda filed an opposition to the Motion, arguing that Proposition 64 should be applied prospectively only in accordance with well-established California and United States Supreme Court precedent including Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994), Lindh v. Murphy, 521 U.S. 320 (1997) and Evangelatos v. Superior Court (1988) 44 Cal.3d 1188. Exhibit D.

7. On December 23, 2004, UPS filed a reply brief (Exhibit E), a request for judicial notice of the Official Voter Information Guide for Propositon 64 (Exhibit F), and declaration of counsel enclosing copies of final and tentative decisions of other trial courts in the state of California on the issue of retroactivity of Proposition 64. Exhibit G.

8. On December 27, 2004, Gnesda filed objections to and motion to strike the declaration of counsel, and exhibits attached thereto, on grounds the decisions of other trial courts were not binding legal authorities and were irrelevant. Gnesda further objected on grounds UPS omitted any reference to decisions rejecting retroactive application of Proposition 64. Exhibit H.

9. Respondent Superior Court of the State of California for the County of Los Angeles, Southeast Judicial District, is now, and at all times mentioned in the Petition has been, a trial court exercising judicial functions in connection with the above-entitled action. The Honorable Peter Espinoza is now, and at all times mentioned in this Petition, has been, a judge of the Respondent Court, and after hearing UPS's motion for judgment on the pleadings, issued the ruling which is the subject of this petition.

10. On December 28, 2004, the court issued its tentative ruling granting the motion on grounds Proposition 64 applied retroactively and barred Gnesda's UCL claim. Exhibit I. The court relied exclusively on the opinion of trial judge Peter D. Lichtman

issued in another case pending in the Los Angeles Superior Court entitled, Goodwin v. Anheuser-Busch Cos., LASC Case No. BC310105.

11. On January 24, 2005, the trial court issued a final order granting the motion without leave to amend. Exhibit J. However, the court certified the question under California Code of Civil Procedure Section 166.1 as presenting a controlling question of law concerning which there are substantial grounds for difference of opinion. The court further found that "appellate resolution of this legal question will materially advance the conclusion of this litigation."

12. Respondent Court legally erred by granting the motion and dismissing the Fourth Cause of Action based on the standing requirements imposed by Proposition 64. Proposition 64 did not contain a retroactivity clause. Further, the ballot materials, including the legislative analysis, fails to provide any clear indication that the electorate intended the law to apply retroactively.

13. The trial court also erred in concluding that the law could be applied prospectively since it only altered rules of procedure. A law operates retroactively if it would "impair rights a party possessed when he acted" or attach "new legal consequences" to events preceding enactment. Landgraf, 511 U.S. at 270 & 280. Section 17204 conferred standing on Gnesda since, at the time his claim accrued and suit was filed, the statute provided that actions for relief could be prosecuted by any person acting on behalf of the general public. In Californians For Disability Rights, the court held that application of Proposition 64 to previously filed complaints "would plainly constitute a retroactive application of the law since it would deny parties "fair notice and defeat their reasonable reliance and settled expectations." (2005 DJDAR at 1349.)

14. Gnesda has no plain, speedy and adequate remedy for Respondent Court's error.

PRAYER

WHEREFORE, Petitioner prays that this Court:

1. Immediately issue a peremptory writ of mandate directing Respondent Superior Court to set aside and vacate its order granting UPS's Motion For Judgment on the Pleadings As To Plaintiff's Fourth Cause of Action For Violations of California Business and Professions Code Sections 17200, 17203 and 17204 and enter an order denying the motion.

2. In the alternative, issue an alternative writ of mandate under the seal of this Court commanding Respondent Superior Court to set aside and vacate its order and enter a new order denying the motion or to show cause before this Court, at a time and place then or thereafter specified by Court order, why Respondent Court has not done so and why peremptory writ should not issue.

3. Award Petitioner his costs incurred in this proceeding.

4. Award Petitioner whatever further relief may be just and proper.

Dated: February 8, 2005

BIENERT & KRONGOLD
THOMAS H. BIENERT, JR.
STEVEN L. KRONGOLD

By:_____
Steven L. Krongold
Attorneys for Petitioner
MICHAEL GNESDA

VERIFICATION OF STEVEN KRONGOLD

I, Steven Krongold, state that I am an attorney with Bienert & Krongold, and one of the attorneys responsible for representing Michael Gnesda in this action. I have read the foregoing Petition for Peremptory Writ of Mandate and have personal knowledge that the matters set forth therein are true and correct, and on that basis allege them to be true and correct. I am verifying this Petition in accordance with California Civil Procedure Code section 446, subdivision (a), because I have knowledge of the events and facts providing the basis for this Petition and Mr. Gnesda does not have that complete knowledge.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in San Clemente, California, on February 9, 2005.

_____

STEVEN L. KRONGOLD

MEMORANDUM OF POINTS AND AUTHORITIES

1. FACTUAL BACKGROUND

Through its marketing materials, pricing literature, oral representations and more--including tariffs-- UPS misled customers and overcharged them to better its stead and stock. The allegations of the First Amended Complaint, attached hereto as Exhibit A, provides an outline of the evidence that Gnesda intends to introduce at trial.

Gnesda began working for UPS in January 1986 as a pre-loader. App. 002-03. Over the next sixteen years, Gnesda received numerous promotions and salary increases. *Id*. In 1998, UPS established the Revenue Recovery Program to generate greater profits in anticipation of an initial public offering. App. 003. While working in the Business Development Group, Gnesda suspected that UPS was engaged in fraudulent billing practices that resulted in a $50.00 surcharge for oversize and irregularly-shaped packages. App. 004. Gnesda reported these illegal billing practices to UPS senior management. App. 004. Thereafter, UPS abruptly transferred Gnesda out of business development and reassigned him to the "graveyard" shift in operations. UPS harassed and intimidated Gnesda with demeaning self-improvement tasks and punitive job assignments in hopes he would quit. App. 004-5.

On March 30, 2002, UPS terminated Gnesda. Gnesda contends the stated reason for termination--that he had authorized the falsification of an employee's time card--was pretextual and that the real motivation was to retaliate for his complaints to management about the billing practices. App. 005.

Gnesda alleged that UPS did more than merely breach its contract with clients. Gnesda alleged that in order to generate more income, UPS "regularly charged customers additional fees" even when those customers had packaged items in accordance with the listed tariffs. Exhibit A at App. 006. UPS falsely led customers to believe they could avoid such charges if the tariffs were followed. *Id.*

In addition to wrongful termination, Gnesda brought a claim under the Unfair Competition Law (Bus. & Prof. Code, §17200) (UCL). In enacting the UCL, the Legislature declared that prohibiting "unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices" was an important public policy of this State. Bus. & Prof. Code, §17001. The UCL conferred standing on "any person acting for the interests of itself, its members, or the general public." Id. at 17204.

On November 2, 2004, the California electorate passed Proposition 64 which imposed strict standing requirements for private UCL claims. Under Proposition 64, a private person may pursue claims on behalf of others or the general public if the claimant suffered an injury in fact as a result of the challenged business practice and meets the requirements for a class representative.

Based on Proposition 64, UPS filed a Motion For Judgment on the Pleadings As To The Plaintiff's Fourth Cause of Action For Violations of California Business and Professions Code Sections 17200, 17203 and 17204, arguing that the law applied to all pending cases, including Gnesda's.

On January 24, 2005, the trial court issued a final order granting the motion without leave to amend. However, the court certified the question under California Code of Civil Procedure Section 166.1 as presenting a controlling question of law concerning which there are substantial grounds for difference of opinion. The court further found that "appellate resolution of this legal question will materially advance the conclusion of this litigation."

2. ARGUMENT

A. INTRODUCTION

Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994), held there is a presumption against retroactive application of new laws that "is so deeply rooted in our jurisprudence and [that] embodies a legal doctrine older than our Republic." Lindh v. Murphy, 521 U.S. 320 (1997), applied *Landgraf's* default rule to deny retroactivity of a

new rules governing habeus corpus petitions in the Antiterrorism and Effective Death Penalty Act of 1996. According to the Ninth Circuit, Langraf has "so altered the legal landscape so that prospective application has unquestionably become the default rule." Jeffries v. Wood, 114 F.3d 1484, 1494 (9th Cir. 1997), cert. denied, 522 U.S. 1008.

Under Landgraf, if a statute does not "clearly mandate" an application with retroactive effect, the court must determine whether the new statute would have genuinely retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If so, "the judicial presumption against retroactivity would bar its application." Lindh, supra, 521 U.S. at 324.

The fact this case involves a ballot initiative does not change the default rule against retroactive application of new laws. The power of the people to enact laws through a ballot initiative is coextensive with, not greater than, the power of the Legislature to enact laws. Legislature v. Deukmejian (1983) 34 Cal.3d 658, 675. Thus, measures adopted by the voters through the initiative process are subject to the ordinary rules and canons of statutory construction. Evangelatos v. Superior Court (1988) 44 Cal.3d 1188 (Proposition 51 does not apply retroactively).

B. NO CLEAR MANDATE IN FAVOR OF RETROACTIVITY

Proposition 64 is silent as to retroactivity. Landgraf suggested the following language might qualify as a clear statement for retroactive effect: "[This Act] shall apply to all proceedings pending on or commenced after the date of enactment of this Act." 511 U.S. at 260. In Lindh, the Court noted that the language must be "so clear that it could sustain only one interpretation." Lindh, 521 U.S. at 329, n. 4.

UPS argues that use of words in the present or active voice should imply a retroactive intent (e.g., "pursue" and "prosecute"). First, the active voice could mean it applies prospectively to any attempt to initiate and pursue an unfair competition claim. Second, the argument falls far short of a "clear mandate" or "clear statement" of voter

intent to apply its term to pending cases. Absent the necessary statement of intent, the court must turn to the second Landgraf element and decide if the initiative has retroactive effect. In statutory construction, courts presume the Legislature acted with awareness of relevant judicial decisions. Jeffries, 114 F.3d at 1495. The same rules apply to ballot initiatives drafted by or with the assistance of lawmakers, attorneys and other professionals. The sponsors of the initiative made a deliberate choice not to express any position on retroactivity; therefore, this court cannot discern, as UPS argues, a clear intent to apply it to pending cases. As stated in both Lindh and Jeffries, if lawmakers had intended to apply the new law to pending cases, they should have stated so "unequivocally." Jeffries, 114 F.3d at 1496 ("Congress did not do so, much less rebut the presumption against retroactive application of new laws with a clear statement to the contrary, and we are compelled to give force to that decision.").

C. PROPOSITION 64 SHOULD NOT BE APPLIED RETROACTIVELY

UPS argues that Proposition 64 is merely a rule of procedure that can be applied to cases pending at the time of enactment. Here, again, UPS misstates the law. A law operates retroactively if it would "impair rights a party possessed when he acted" or attach "new legal consequences" to events preceding enactment. Landgraf, 511 U.S. at 270 & 280. Section 17204 conferred standing on Gnesda since, at the time his claim accrued and suit was filed, the statute provided that actions for relief could be prosecuted by any person acting on behalf of the general public. Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65. Proposition 64 would deprive Gnesda of standing to sue since he does not allege direct injury or meet the requisites of class certification set forth in C.C.P. §384.

Contrary to the arguments of UPS, Gnesda's standing derives from a substantive right. "Generally, the real party in interest is the person who has the right to sue *under the substantive law.* It is the person who *owns or holds title* to the claim or property involved, as opposed to others who may be interested or benefited by the litigation. [¶]

Real party in interest issues are often discussed in terms of plaintiff's 'standing to sue." Weil and Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2003) ¶ 2:2, pp. 2-1 to 2-2 (cites omitted) (italics added); Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 1004; Windham at Carmel Mountain Ranch Assn. v. Superior Court (2003) 109 Cal. App. 4th 1162.

Even if standing were construed as partly procedural, this would not affect Gnesda's position. The Supreme Court addressed issue: "The mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case." Landgraf, 511 U.S. at 275, n. 29. The Lindh Court also noted that a rule is merely procedural if it sets deadlines for filing and disposition (521 U.S. at 327) or the like. However, a rule that changes the standards of proof and persuasion in a way more favorable to one party goes beyond "mere" procedure to affect a "substantive entitlement to relief." Id.

If changes to standards of proof constitute substantive changes, then surely changes to standing requirements that can result in termination of a lawsuit or claim directly affects the substantive rights of the affected party. Moreover, Gnesda relied on the law under the "old regime" and filed his suit expecting to obtain an order that UPS refund overcharges to its customers and possibly recover his attorney's fees. See, Kraus v. Trinity Mgt. Services, Inc. (2000) 23 Cal.4th 116 (defendant should be ordered to locate former tenants and refund overcharges).

A determination of retroactivity rests on considerations of fair notice, reasonable reliance, and settled expectations. In Evangelatos, for example, the California Supreme Court applied the Landgraf default rule and held that the tort reform measures enacted by Proposition 51 were prospective only. Thus, the ballot measure applied only to causes of

action "accruing" after its effective date of June 4, 1986. See also, Californians For Disability Rights v. Mervyn's LLC, __ Cal.App.4th __, 2005 DJDAR 1347, 1349 (2-1-05).

In a desperate attempt to deny Gnesda a valid claim on behalf of consumers, UPS misleads the court with at least three other arguments. First, UPS asserts the general rule that courts should apply the law in existence at the time a decision is rendered. However, UPS fails to inform the court that this general rule coexists with the presumption against statutory retroactivity. Landgraf, 511 U.S. at 273.

Second, UPS argues that Proposition 64 should apply immediately since it is a statutory repeal that does not impair vested rights. The cases UPS cites on statutory repeal have no application post-Landraf where there is no clear voter mandate to apply the statute retrospectively. The Supreme Court also rejected the vested rights argument in fairly strong terms: "Contrary to Justice SCALIA's suggestion . . . we do not restrict the presumption against statutory retroactivity to cases involving 'vested rights.' " Id. at 273.

Third, UPS asserts that Proposition 64 ousts the court of jurisdiction. "Jurisdictional statutes concern the power of the court, not the rights or obligations of the parties." Jeffries, 114 F.3d at 1498, citing Landgraf, 511 U.S. at 274. The Jeffries court analyzed the distinction as follows:

> Title I dictates how federal courts should exercise their jurisdiction. The Act does not prohibit federal courts from entertaining petitions for writs of habeas corpus; it instructs that the writ "shall not be granted" unless certain criteria are satisfied. 110 Stat. at 1219. Thus, the amendments to Chapter 153 are not "jurisdictional" as that term is contemplated by Landgraf.

Jeffries, 114 F.3d at 1498.

Proposition 64 is not a jurisdictional statute; it does the not prevent the court from hearing UCL claims. Rather, it empowers the court to dismiss claims that do not meet the new standing requirements.

D. THE JUDICIAL PRESUMPTION AGAINST RETROACTIVITY BARS APPLICATION OF PROPOSTION 64 TO THIS ACTION

The third *Landgraf* stage is conclusory: if the new legislation would operate retroactively, then "the judicial presumption against retroactivity would bar its application." Lindh, 521 U.S. at 324.

3. CONCLUSION

Since Proposition 64 could operate retroactively and deny Gnesda standing to assert an unfair competition claim, and since there is no clear public mandate to apply the initiative in this manner, the court should have adhered to the long-standing presumption against retroactivity of new laws. Hence, this Court should issue a peremptory writ holding that Proposition 64 applies prospectively only or, alternatively, issue a writ of mandamus requiring the trial court to set aside and vacate its order granting UPS's motion for judgment on the pleadings.

DATED: February 8, 2005

BIENERT & KRONGOLD
THOMAS H. BIENERT, JR.
STEVEN L. KRONGOLD

By: _____
Steven L. Krongold
Attorneys for Petitioner
MICHAEL GNESDA

Certification of Word Count

I, Steven L. Krongold, state that I am an attorney at law duly licensed to practice before this Court and a member of Bienert & Krongold, the attorneys of record for Respondent and Plaintiff Michael Gnesda. Pursuant to Rule 14(c)(1) of the California Rules of Court, I certify that this petition, including the memorandum of points and authorities but excluding the various tables, contains 4,134 words, according to the Microsoft Word computer program used to prepare this brief.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in San Clemente, California on February 8, 2005.

_____

Steven L. Krongold

CERTIFICATE OF SERVICE

I, Christi Coles, declare as follows:

I am employed in the County of Orange, State of California: I am over the age of eighteen years and am not a party to this action; my business address is 107 Avenida Miramar, Suite B, San Clemente, CA 92672, in said County and State. On February 9, 2005, I served the following document(s):

PETITION FOR PEREMPTORY WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; AND APPENDIX OF EXHIBITS

on all parties stated below, by placing a true copy thereof in an envelope addressed as shown below by the following means of service:

SEE ATTACHED SERVICE LIST

BY UPS NEXT DAY AIR: On the above-mentioned date, I placed a true copy of the above mentioned document(s), together with an unsigned copy of this declaration, in a sealed envelope or package designated by the United Parcel Service with delivery fees paid or provided for, addressed to the person(s) as indicated above and deposited same in a box or other facility regularly maintained by United Parcel Service or delivered same to an authorized courier or driver authorized by United Parcel Service to receive documents.

I am employed in the office of Thomas H. Bienert, Jr., a member of the bar of this court, and that the foregoing document(s) was(were) printed on recycled paper.

(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 9, 2005.

_____

Christi Coles

SERVICE LIST
GNESDA v. UPS

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