No. S_____

IN THE SUPREME COURT OF CALIFORNIA

SCOTT C. TURNER

Plaintiff and Petitioner,
v.
HARTFORD FIRE INS. CO., ET AL

Defendants and Respondents.

California Court of Appeal,
First Appellate District, Division One, No. A109257

Superior Court of the State of California
County of San Francisco
Hon Richard A. Kramer, Judge
Superior Court Master Case File No. 323192

PETITION FOR REVIEW

Service on Attorney General and District Attorney required by Bus. & Prof. Code § 17209
(See Cal. Rules of Court, rule 44.5)

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I. ISSUE PRESENTED

The issue presented in this Petition is similar to the issue presented in a number of pending cases before the Court: Did the Court of Appeal err when, in a published decision, it concluded that the voters intended Proposition 64 to be applied retroactively to actions filed before the initiative became law — even actions like this one filed in 2001 whose subject matter subsequently became focus of numerous attorney general and department of insurance investigations, including the California Attorney General who announced his investigation of the practices alleged in Petitioner's suit in October, 2004.

In addition, even assuming the applicability of Proposition 64, this petition presents the issue of whether the Court of Appeal erred in denying the trial court the discretion to allow Petitioner to substitute a new plaintiff so as to satisfy Proposition 64's requirements.

II. WHY REVIEW SHOULD BE GRANTED

This Court will grant review where there is a demonstrated need "to secure uniformity of decision" or "to settle an important question of law." (Cal. Rules of Court, rule 28(b)(1).) By these standards, the Court of Appeal's published decision holding Proposition 64 applicable to this case indisputably warrants review by this Court.

This Court already has granted review of numerous other Proposition 64 decisions, most notably the rulings in *Californians for Disability Rights v. Mervyn 's, LLC*, No. S 131798 (*Mervyn's*), and *Branick v. Downey Savings Bank*, No. S 132433 (*Branick*). In these cases, the Court requested briefing on the issue of Proposition 64's retroactivity, as well as the question whether amendment should be permitted in such cases. Since then, it has accepted "grant and hold" review of virtually every other published decision addressing these issues.[1]

The Court's interest in these issues is not surprising. There has been a significant split of opinion in the intermediate appellate courts regarding Proposition 64's application to pre-existing "private attorney general" cases brought pursuant to California's unfair competition laws, Business & Professions Code sections 17200 and 17500 et seq. (UCL) - a split which continues to this day with the most recent published decision in this case. Resolution of these questions will provide urgently needed uniformity and guidance to the lower courts.

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[1] This Court has accepted "grant and hold" review in at least the following cases: *Benson v. Kwikset Corp.*, No. S132443; *Bivens v. Corel Corp.*, No. S132695; *Lytwyn v. Fry's Electronics, Inc.*, No. S 133075 [review granted after request for depublication filed]; *Thornton v. Career Training Center*, No. S133938; *Schultz v. Neovi Data Corp.*, No. S134073; *Cohen v. Health Net of California*, No. S135104; *Consumer Advocates Group, Inc. v. Kintetsu Enterprises*, No. S135587; and *Schwartz v. Visa Int'l Service Assn.*, No. S138751.

In the absence of review, this case will be returned to the trial court and judgment entered against Petitioner dismissing the case in its entirety solely on the ground of the Court of Appeal's published Proposition 64 decision, without this Court itself having had the opportunity to rule on the issue of Proposition 64. Such a result would deprive Petitioner of the fundamental due process of having the Proposition 64 issue decided before dismissal of Petitioner's suit, a suit which has been litigated over the course of five years and in which Petitioner has invested substantial resources and effort pursuing the claims. Indeed, the claims asserted in this lawsuit when it was filed 2001 later became the subject of numerous Attorney General and Department of Insurance investigations in California and throughout the nation.

Accordingly, in light of the conflicting intermediate appellate decisions on this issue, including the published decision in this case and the import of the retroactivity decision to the future of this case, Petitioner respectfully requests that the Court grant review or at a minimum accept "grant and hold" review.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Underlying Litigation

This is a representative action brought under Business and Professions Code §17200 et seq. ("§17200") by Scott C. Turner ("Turner" or "Petitioner" or "Plaintiff"), an attorney who regularly represents

insurance policyholders in coverage matters.[2] Turner filed complaints against the Defendants beginning in July, 2001 to expose and bring to an end kickback schemes between the Defendants and brokers who procure insurance for small businesses and individuals. (RSA at 1).[3] Those complaints were subsequently consolidated and given a joint case caption. (RSA at 22). Under the schemes alleged in the complaints, Defendants pay insurance brokers an annual sum of money based upon the volume of business the broker has generated for the insurance company and, in some instances, the profitability of that business for the insurance company. (RSA at 1-21). Those arrangements are highly improper because the broker is the agent of its client, the consumer, for purposes of procuring insurance. (Id.) The kickbacks provide the broker with a powerful economic incentive to steer business to the insurance company instead of finding its client the best insurance at the best price and pressing for payment of claims. (Id.)

Recently, state regulators have taken up this cause, including the California Attorney General who announced his investigation of the practices in October, 2004. In New York, the New York Attorney General

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[2] Mr. Turner has authored a treatise on issues relating to construction insurance coverage. Scott C. Turner, *Insurance Coverage of Construction Disputes* (West Group 2nd Ed. 2004). Mr. Turner is also a recent chair of the American Bar Association Construction Insurance Coverage Subcommittee.

[3] "RSA" references the exhibits filed in the Court of Appeal by the Defendants and Respondents in this matter as part of Respondents Petition for Writ of Mandate.

has sued the world's largest insurance broker for allegedly engaging in the very same type of so-called "contingent commission" kickback scheme at issue in this case (the "Attorney General Suit"). The Attorney General has identified three of the four giant insurance groups which are defendants below as participants in the schemes: AIG, Hartford and Chubb. The Attorney General Suit challenges the legality of such arrangements and alleges that the contingent commission arrangements led to actual and proposed bid-rigging in which those defendants were complicit. At least two employees of AIG have pleaded guilty to felony fraud charges stemming from the bid-rigging.

As set forth in Petitioner's currently pending summary adjudication papers in the trial court, those guilty pleas are conclusive proof that the conflict of interest for brokers created by the contingent commission schemes can have a powerfully corrupting influence upon the insurance marketplace, to the detriment of consumers.

B. The Passage of Proposition 64 and Defendants' Motion for Judgment on The Pleadings

Following the November 2, 2004 passage of Proposition 64, on November 29, 2004 Defendants' brought a motion for judgment on the pleadings in the trial court based on Plaintiff's purported lack of standing under the UCL as amended by Proposition 64. (RSA at 71-205). After briefing and oral argument, the trial court denied Defendants' Motion and

held that Proposition 64 did not operate retroactively to bar Plaintiff's suit. (RSA at 213-262).

C. The Court of Appeals Published Decision After Defendants' Petition For Writ of Mandate Regarding Proposition 64

On February 16, 2004 Defendants filed a petition for writ of mandate in the First Appellate District seeking to overturn the trial court's denial of Defendants' Motion for Judgment on the Pleadings. Following grant of the writ, briefing and oral argument, the Court of Appeal issued its published decision on November 30, 2005. (*See* Exhibit "A" attached hereto).

In its published decision, the Court of Appeal concluded that that Proposition 64 repealed the statutory basis for private, unaffected individuals to sue as "private attorneys general" under the UCL. (*See* Exhibit A attached hereto at 1-7). Specifically, the Court of Appeal held that pursuant to the "statutory repeal rule" "when Proposition 64 went into effect, it did not reach back and retroactively affect a vested right, it simply repealed earlier legislation, thereby depriving persons such as Turner of the statutorily conferred power (i.e., standing) to prosecute UCL claims." (*See* Exhibit "A" attached hereto at 6).

D. Plaintiff's Petition For Rehearing and the Court of Appeal's Modification Of Its Decision

On December 15, 2005 Plaintiff filed a petition for rehearing on the ground that the Court of Appeal omitted from its opinion the material issue of whether Plaintiff was entitled to leave to amend his complaint to substitute a new plaintiff to satisfy the requirements of Proposition 64, an issue which was briefed and argued by the parties.

On December 30, 2005 the Court of Appeal issued an order modifying its opinion to include a new paragraph denying Plaintiff the right to seek leave to amend his complaint to substitute a new plaintiff to satisfy the requirements of Proposition 64. (*See* Exhibit "B" attached hereto). The Court of Appeal held that "[s]uch a procedure would be inconsistent with the evident intent of the proposition to discourage persons who have not suffered actual injury from initiating litigation for violations of the UCL." (See Exhibit "B" attached hereto at 1).

IV. ARGUMENT

A. Proposition 64 Does Not Fall Within the Line of Cases Regarding Retroactive Repeals

1. The Repeal Rule Applies Only To Legislative Repeals, Not Voter Initiatives

The Court of Appeal erroneously relied on the "repeal rule" to support its holding regarding retroactivity. Specifically, the Court of Appeal relied on *Callet v. Alioto* (1930) 210 Cal. 65 for the proposition that a cause of action or remedy dependent on statute falls with a repeal of

the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute.

Notwithstanding the fact that Plaintiff maintains that the repeal rule does not apply to Proposition 64 as discussed further below, the Court of Appeal's holding ignores a crucial fact: to the extent that the repeal rule applies at all, it applies only to legislative repeals, not voter initiatives.

Plaintiff has been unable to locate any case in which the repeal rule was applied to a voter initiative. Indeed, each of the cases cited by Respondents to the Court of Appeal involved a legislative repeal, not a voter initiative repeal. *See e.g. Younger v. Superior Court* (1978) 21 Cal.3d 102; *Governing Board of Rialto Unified School District v. Mann* (1977) 18 Cal.3d 819; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828; *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120.

The distinction between a legislative repeal and a repeal through voter initiative is crucial. A legislature, as a body charged with making the laws, knows that by repealing a procedural or remedial statute there may be retroactive effect unless the legislature chooses to include a savings clause. In contrast the public, when it votes on an initiative such as Proposition 64, has no idea that if it repeals a statute it could have retroactive effect, absent clear language indicating that intent.

Thus, because the primary goal of enforcing legislation is to give effect to its intent, a court should not give retroactive effect to a voter initiative unless there is a clear intent expressed in the initiative itself and by extension the voters, that the initiative should be applied retroactively. *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1193-1194 ("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 "there is nothing to suggest that the electorate considered the issue of retroactivity at all.")

Accordingly, for this reason alone the Court of Appeals reliance on the repeal rule is misplaced and review should be granted.

2. The Court of Appeal's Reliance On Cases Involving Statutory Repeals Is Misplaced

The Court of Appeal's reliance on a line of cases involving statutory repeals is misplaced. Particularly as they have evolved in the last half century, those cases represent but another way of stating the cardinal rule of construction on which this Court relied in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188: the controlling principle is always legislative intent. *See also In re Lance W.* (1985) 37 Cal.3d 873, 889 (ascertaining the intent of the electorate is the court's "paramount consideration"). Unambiguous repeal of a statutorily created cause of action, without a

savings clause, demonstrates that the Legislature did in fact intend to stop all litigation based on that cause of action. That is not what happened here.

Proposition 64 did not repeal the right of the public to obtain relief under section 17200. That right remains unimpaired. Proposition 64 changed the requirements for standing to sue on behalf of the public. As demonstrated above, there is not a hint in the ballot materials that the voters intended to halt actions that were already pending, thus allowing defendants to escape liability for conduct that occurred prior to passage of the initiative.

There are two modern California Supreme Court cases that address the retroactive repeal rule. In *Governing Board of Rialto Unified School District v. Mann* (1977) 18 Cal.3d 819, this Court gave retroactive effect to a statute prohibiting any public entity from revoking any right of an individual as a result of a conviction for possession of marijuana prior to the statute's passage, provided that two years had passed since the conviction. The case involved a schoolteacher who had been convicted of possession in 1971. The school district that employed him moved to dismiss him based on an Education Code provision that allowed dismissal based on a crime involving moral turpitude. While that suit was pending on appeal, the Legislature passed the statute that prohibited using a marijuana conviction as a basis for dismissal.

In holding that the statute applied to the pending appeal, the *Rialto* court summarized the law governing retroactive repeals as follows:

> Although the 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 such a statute without a saving clause will terminate all pending actions based thereon.'

Id. at 829. The Court continued:

> By parity of reasoning, the present trial court judgment in favor of the school district clearly cannot stand. The school district's authority to dismiss defendant rests solely on statutory grounds, and thus under the settled common law rule the repeal of the district's statutory authority necessarily defeats this action which was pending on appeal at the time the repeal became effective.

Id. at 830.

The statute itself made clear in *Rialto* that the Legislature intended to repeal the district's right to take disciplinary action based on an old conviction. This Court described the statute as follows:

> That section provides, in broad and sweeping language, that no public agency, including a school district, shall impose any sanction upon an individual on the basis of a possession of marijuana arrest or conviction, or on the basis of the facts or events leading to such an arrest or conviction, "on or after the date the records of such an arrest or conviction are required to be destroyed, [footnote omitted] . . . or two years from the date of such conviction or arrest

> without conviction with respect to arrests and convictions occurring prior to January 1, 1976."

Id. at 827 (emphasis omitted.)

Thus, by its own terms, the statute in *Rialto* applied to convictions "occurring prior to January 1, 1976," and there could be no doubt that the Legislature intended to prevent the district from dismissing its employee on the basis of such a conviction.

Close on the heels of *Mann,* this Court decided its only other modern case on retroactive repeals. In *Younger v. Superior Court* (1978) 21 Cal.3d 102, the Court gave retroactive effect to another part of the same legislation at issue in *Mann*.[4] That statute replaced an earlier provision that had authorized the superior courts, on petition, to order the destruction of records of arrests or convictions for possession of marijuana prior to January 1, 1976. 21 Cal.3d at 107-108. Effective January 1, 1977, however, the new statute provided for destruction of those records by order of the Department of Justice upon application by the person affected. Citing the retroactive repeal rule, the Supreme Court ordered the superior court to vacate its destruction order because "the Legislature has revoked

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[4] *Mann* described the legislation as "an entirely new comprehensive statutory scheme to govern the treatment of marijuana offenses and offenders." 18 Cal.3d at 826.

the statutory grant of jurisdiction for this proceeding, and has vested it in no other court." 21 Cal.3d at 110.[5]

The *Younger* Court quoted its earlier opinions to the effect that the justification for the rule that repeal of a statutory right has retroactive effect "'is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time.'" *Younger, supra,* 21 Cal.3d at 109, *quoting Governing Board v. Mann, supra,* 18 Cal.3d at 829 and *Callet, supra at* 67-68. Implicit in this reasoning, of course, is an actual intent on the part of the Legislature to abolish the right to recover. In other words, the issue turns on what it means to "repeal" a right or a remedy and whether the Legislature (or in this case, the electorate) thought it was repealing a statutory right or merely changing the circumstances under which it can be pursued.

Perhaps the most instructive modern case on the retroactive repeal rule is one in which this Court did not mention the rule at all. In *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, this Court rejected the argument that the Legislature's repeal of a statute that gave tobacco companies immunity from suit should operate retroactively to revive claims that accrued during the time the statute was in effect. Despite

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[5] The Court also ordered the Attorney General to accept and act upon the applicant's request. 18 Cal.3d at 118.

the fact that it referred to the new statute as "the Repeal Statute" throughout its opinion, the Court never mentioned the retroactive repeal rule or any of the cases on which defendants now rely. 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.'" 28 Cal.4th at 841, *citing Evangelatos*, *supra*, 44 Cal.3d at 1209 (emphasis in original).

The Court did all this despite evidence that the Legislature unequivocally repealed a statute and that, judging from the language of the Repeal Statute itself, the Legislature could have intended to make that repeal retroactive. *Id.* at 842-843. That, the Court said, was not enough:

> [E]ven were we to accept that proposed reading of subdivision (f), the Repeal Statute is, at best, ambiguous on the question of retroactivity . . . . This ambiguity requires us to construe the Repeal Statute as "unambiguously prospective."

28 Cal.4th at 843. Thus, in *Myers,* contrary to the Court of Appeal's reasoning, 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. *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.")

Indeed, the rationale driving the Court of Appeal's decision in this case based on *Myers* more closely resembles the argument made in the *Myers* dissent. To no avail, Justice Moreno expressly invoked the repeal rule in *Myers*, contending: "[S]tatutory rights, unlike common law rights, [are] 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.'" *Myers*, *supra*, 28 Cal.4th at 853 (dis. opn. of Moreno, J.).)

Myers, however, did not turn on whether the right at stake was vested. As noted, the right there (immunity from suit) did not exist at common law. Nonetheless, this Court focused on the intent question, holding that retroactive application of a statute is impermissible "unless there is an express intent of the Legislature" to make it retroactive. *Myers*, *supra*, 28 Cal.4th at 840.

Accordingly, whereas the Repeal Rule arguably may apply to a legislative repeal, absent clear language in a voter initiative indicating to the voters that the initiative will be applied retroactively, a court should not give retroactive effect to the initiative. Thus, because Proposition 64 contains no language indicating an intent to apply the Proposition

retroactively, as discussed above, the Court of Appeals decision should be reversed.

B. This Court's Authority Supports Strongly The Requirement For Expression Of Clear and Unambiguous Intent

In reviewing an earlier "tort reform" initiative, this Court set out the principles applicable here. Holding that Proposition 51, which eliminated joint and several liability for tort defendants, 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 v. Superior Court* (1988) 44 Cal.3d 1188, 1193-1194.[6] 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

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[6] *See also Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal. 4th 828, 841 ("As the United States Supreme Court has consistently stressed, the presumption that legislation operates prospectively rather than retroactively is rooted in constitutional principles: 'In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.'" (*quoting Landgraf v. USI Film Products (1994) 511 U.S. 244, 265-266*)).

reform legislation should apply prospectively or retroactively . . . have concluded that the statute applies prospectively," the Court refused to give the measure retroactive effect. *Id.*

So it should be here. Nothing in Proposition 64 indicates *any* intent, much less a clear one, that the measure was intended to apply to cases already under way. *Evangelatos,* 44 Cal.3d 1188, 1194 (concluding that Proposition 51 "did not include any language . . . indicating that the measure was to apply retroactively . . ."). Moreover, "[t]he 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. Indeed, Proposition 64's findings suggest that the measure is intended to prevent future actions from being *filed*, not to terminate 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 have no client who has been injured in fact under the standing requirements of the United States Constitution." (Emphasis added.)[7]

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[7] The measure includes a provision that repeals any inconsistent legislation enacted between July 1, 2003 and the effective date of the measure. (Prop 64, § 7.) Although this provision appears, on its face, to apply retroactively, it is simply a restatement of existing law. A later-enacted statute repeals by implication existing law that is in direct conflict with the statute. *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 343.

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*, 44 Cal.3d 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. (*See* http://www.voterguide.ss.ca.gov/english.pdf at 38-39). In fact, consistent with the measure's findings, the Legislative Analyst explained that Proposition 64 "prohibits any person, other than the Attorney General and local pubic prosecutors, from *bringing* a lawsuit for unfair competition unless the person has suffered injury and lost money or property." (*See* http://www.voterguide.ss.ca.gov/english.pdf at 38) (emphasis added). The proponents' ballot arguments also emphasized Proposition 64 would "[a]llow[] only the Attorney General, district attorneys, and other public officials to *file* lawsuits on behalf of the People of the State of California . . ." (*See* http://www.voterguide.ss.ca.gov/english.pdf at 40) (emphasis added). Proposition 64 simply did not put the voters on notice that it would apply to pending cases. As the California Supreme Court said with respect to another tort reform measure adopted by the voters, "the voters should get what they enacted, not more and not less." *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.

Accordingly, the Court of Appeal's holding is incorrect and review should be granted.

C. In The Alternative, Plaintiff Should Be Permitted To Seek Leave to Amend The Complaint

In the alternative, if this Court decides in favor of Petitioners and finds that Proposition 64 is retroactive, Plaintiff should be permitted to seek leave to amend to substitute a new plaintiff to satisfy the requirements of Proposition 64.

Code of Civil Procedure section 473 authorizes a court wide discretion in adding parties to litigation. In addition, the courts "have permitted amendments to substitute new plaintiffs under certain circumstances when the named plaintiffs are not able to maintain the alleged claims. *Klopstock v. Sup. Ct.* (1941) 17 Cal.2d 13, 21(permitting substitution of new plaintiff where original plaintiff was found not to be proper party); *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872 (permitting substitution of new plaintiff where original plaintiff was found not to be proper party).

Here, the Court of Appeal denied Turner the right to seek leave to amend in the trial court because "[s]uch a procedure would be inconsistent with the evident intent of the proposition to discourage persons who have not suffered actual injury from initiating litigation for violations of the UCL." (See Exhibit B attached hereto at 1). To the contrary, leave to amend and substitute a new plaintiff meeting the actual injury requirements of Proposition 64 would squarely meet the intent of

Proposition 64 to permit injured plaintiffs to continue to seek relief for violations of the UCL.

Accordingly, the Court of Appeal's decision denying the right to seek leave to amend should be reversed in the event that this Court finds Proposition 64 to operate retroactively and review should be granted.

V. CONCLUSION

For the reasons stated, Petitioner respectfully requests that the Court grant his petition for review. Petitioner welcomes the opportunity to brief these important issues now. In light of the pending *Mervyn's* and *Branick* matters, however, Petitioner believes that, at a minimum, "grant and hold" review would be appropriate.

DATED: January 6, 2006

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CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 14(c)(1))

Pursuant to California Rules of Court, rules 14(c)(1) and 56(b)(6), I certify that this brief, including footnotes, consists of 4,182 words exclusive of those materials not required to be counted under Rules 14(c)(3) and 56(b)(6).

DATED: January 6, 2006

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: The Furth Firm LLP, 225 Bush Street, 15th Floor, San Francisco, CA 94104.

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FEDERAL EXPRESS: I caused the within documents to be served in a sealed Federal Express Envelope with delivery fees provided for and deposited in a facility regularly maintained by Federal Express.

In addition, on January 6, 2005 I served the following documents:

PETITION FOR REVIEW

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by:

U.S. MAIL: I am personally and readily familiar with the business practice of The Furth Firm LLP, for collection and processing of correspondence for mailing with the United States Postal Service, pursuant to which mail placed for collection at designated stations in the ordinary course of business is deposited the same day, proper postage prepaid, with the United States Postal Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 6, 2006 in San Francisco, California.

_____