Case No. S131798

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS,

Plaintiff and Appellant,

vs.

MERVYN'S LLC,

Defendant and Respondent.

On Petition for Review After a Denial of a Motion to Dismiss by the Court of Appeal, First Appellate District, Division Four, No. A106199.

AMICUS CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE, THE CALIFORNIA BANKERS ASSOCIATION, THE CALIFORNIA FINANCIAL SERVICES ASSOCIATION, THE CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION, AND THE CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, ON PROPOSITION 64's APPLICATION TO PENDING CASES, IN SUPPORT OF DEFENDANT AND RESPONDENT MERVYN'S LLC

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Alleged Unfair Competition (Bus. & Prof. Code § 17200 et seq.)
Service on Attorney General and District Attorney, as required by Bus. & Prof. Code § 17209, Cal. Rules of Court 15(c)(3) and 44.5(c)

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INTRODUCTION AND SUMMARY OF ARGUMENT

The California Chamber of Commerce, the California Bankers Association, the California Financial Services Association, the California Manufacturers & Technology Association, and the California Motor Car Dealers Association, respectfully submit this amicus curiae brief in support of the position of Mervyn's LLC ("Defendant" or "Mervyn's") that Proposition 64 applies to cases pending before the initiative was enacted on November 2, 2004 and took effect the next day; and in opposition to the contrary arguments advanced by Californians for Disability Rights ("Plaintiff" or "CDR"). There are two distinct reasons Proposition 64 applies to pending cases.

First, Proposition 64 applies to pending cases under the "well settled rule that an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final" (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 109 (*Younger*); accord, *Governing Bd. v. Mann* (1977) 18 Cal.3d 819, 828-831 (*Mann*); *Wolf v. Pacific Southwest Discount Corp.* (1937) 10 Cal.2d 183, 184-185 (*Wolf*); see also Gov. Code, §§ 9606, 9605), referenced herein as the "Repeal Rule." The distinctive feature of a new enactment that triggers the Repeal Rule is the elimination, and thus repeal, of the statutory authority for a purely statutory right of action or remedy without a "saving clause" prior to non-appealable final judgment. (*Younger*, *supra*, at pp. 109-110; *Mann*, *supra*, at pp. 828-829; *Wolf*, *supra*, at pp. 184-185.) The Repeal Rule's justification is that all purely statutory rights of action and remedies are pursued with full realization, and in contemplation, that their statutory basis may be repealed at any time while the case remains pending. (*Ibid.*; *Callet v. Alioto* (1930) 210 Cal. 65, 67-68 (*Callet*); accord, Gov. Code, § 9606.)

Proposition 64 repeals the statutory authority for *uninjured* parties to prosecute purely statutory claims under California's Unfair Competition

Law, Bus. & Prof. Code, §§ 17200 et seq. ("UCL"),[1] without any saving clause. Specifically, Proposition 64 *strikes* the language in the UCL's standing provision, section 17204, formerly authorizing claims to be prosecuted by any private person "acting for the interests of itself, its members or the general public." (Prop. 64, § 3; compare *Stop Youth Addiction v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 560-562 (*Stop Youth Addiction*) [interpreting that now-repealed language to authorize uninjured private parties to prosecute UCL claims for general public].) That triggers the Repeal Rule under this Court's cases, as well as the Legislature's codification of the same principles and policies in Government Code sections 9606 and 9605.

Plaintiff's main contention is that Proposition 64 should not be applied to pending cases based on the *traditional* rule that new statutory enactments generally do not apply "retroactively" without a clear expression of "retroactive" intent. In *Mann*, however, the Court rejected an identical effort to evade immediate application of an intervening repeal to pending cases by reference to "traditional" retroactivity principles, because such efforts are "conclusively refute[d]" by a "long well-established line of California decisions" applying the Repeal Rule. (18 Cal.3d at pp. 828-829, 830 & fn. 8 [new enactments effectively repealing "statutory authority" for purely statutory rights of action without a "'saving clause'" apply to pending cases, quoting *Callet*, *supra*, 210 Cal. at pp. 67-68].) Moreover, *Younger* explicitly holds that the "*only* legislative intent relevant" in cases governed by the "well settled" Repeal Rule is an intention "to save" pending cases "from the ordinary effect of repeal illustrated in cases such as *Mann*." (21 Cal.3d at pp. 109-110, italics added). Thus, Plaintiff's

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[1] Unless noted, statutory references herein are to the Business and Professions Code. Further, Plaintiff's Answering Brief is referenced herein as "AB."

retroactivity arguments are inapposite: the Repeal Rule is a recognized "exception" to the traditional retroactivity analysis Plaintiff invokes. (7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 635, at p. 1037.)

Second, Proposition 64 alternatively applies to pending cases under this Court's distinct jurisprudence governing the prospective and retroactive (or retrospective) application of new statutes. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288-291 (*Tapia*).)

At the outset, applying Proposition 64 to prohibit Plaintiff from *continuing* to prosecute any UCL claim *after* the new enactment's November 3, 2004 effective date is "prospective," not retroactive. (*Ibid.* [courts "look to the date of the conduct regulated by the statute" to determine if application to pending cases is prospective or retrospective].) Plaintiff's position that the UCL's amended standing provision pertains only to who may file UCL complaints in the future disregards that section 17204, as amended, mandates that UCL actions "shall be *prosecuted* exclusively" by private parties who have suffered "injury in fact" and "lost money or property as a result of" the alleged statutory violation, or by designated public officials. (Prop. 64, § 3, italics added.) The plain meaning of the word "prosecute" includes a case's full litigation to completion. (Black's Law Dict. (6th ed. 1990) p. 1221; *Melancon v. Superior Court* (1954) 42 Cal.2d 698, 707-708.) Thus, application of Proposition 64 to hold that this uninjured Plaintiff no longer has standing to prosecute any UCL claim is a *prospective* application to proceedings occurring *after* the new law's effective date, "regardless of when" the "underlying cause of action arose" or the complaint was filed. (*Tapia, supra*, 53 Cal.3d at pp. 288-289.)

Moreover, Plaintiff has failed to bear its burden to show that applying Proposition 64 would have a "retroactive" effect here – for it

would not. Under this Court's cases, Proposition 64's amendments to the UCL's procedural provisions should apply to pending cases because they do not "change the legal consequences of any past events completed" prior to Proposition 64, nor do they deprive this uninjured Plaintiff of any legally cognizable (much less inviolate) "right" it had prior to the initiative's enactment. In fact, Plaintiff cites no authority for the proposition that depriving an *uninjured* party of continued admission into a court of *equity* on a *purely statutory claim* asserted only in a *representative* capacity raises any retroactivity concerns – much less constitutes the sort of retroactive substantive effect that this Court's retroactivity jurisprudence protects against.

BACKGROUND

A. Procedural Background

Plaintiff asserts one UCL claim for the "general public" arising from Defendant's alleged failure to place its in-store movable shelves far enough apart to provide equal access to mobility-impaired persons. Defendant prevailed at trial; Plaintiff appealed. Plaintiff has never claimed that it suffered any injury in fact and lost any money or property as a result of the alleged UCL violations.

B. Proposition 64

While this case was pending on appeal, the voters enacted Proposition 64 on November 2, 2004, which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)

The enactment was based on the finding that the UCL, and California's False Advertising Law, Business and Professions Code sections 17500 et seq. ("FAL"), "are being misused" in private litigation. (Prop. 64, § 1(b).) The root cause of the perceived litigation abuse was the

statutes' formerly broad standing provisions, which had authorized uninjured persons to prosecute claims for the general public.

Proposition 64 identifies cases in which lawyers had employed the UCL and FAL "to file" what the voters deemed "frivolous lawsuits" motivated by "attorneys' fees" for "clients" who were not "injured in fact" and, indeed, who had not even "used the defendant's product or service," "viewed the defendant's advertising," "or had any other business dealing with the defendant." (*Id.*, §§ 1(b)(1), 1(b)(2), 1(b)(3).) The voters voiced their intent "to eliminate" such suits, and to mandate that "only" state and local prosecutors shall "be authorized" both "to file" and to "prosecute" any "actions on behalf of the general public." (*Id.*, §§ 1(d), 1(f).) To *stop* such litigation abuse (*id.*, § 1(d)),[2] the voters altered the UCL and FAL's procedural provisions in sections 17203, 17204, and 17535, but left the substantive proscriptions of sections 17200 and 17500 intact.

Proposition 64 *strikes* – and thus repeals – the language in sections 17204 and 17535 that allowed UCL and FAL actions to be prosecuted by any person "acting for the interests of itself, its members or the general public." (*Id.*, §§ 3, 5.) It provides that such actions "shall be prosecuted exclusively" by designated public officials, or by private persons who suffered "injury in fact" and "lost money or property as a result of" the alleged violations. (*Id.*, §§ 3, 5.)

Proposition 64 also amends sections 17203 and 17535 to provide that private parties may "pursue" UCL and FAL claims in any representative capacity "only" if they both satisfy the law's "standing"

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[2] The pro-Proposition 64 ballot arguments stated that it "***will stop*** thousands" of lawsuits by closing a "LOOPHOLE IN CALIFORNIA LAW," concluding that voters should "Vote Yes" to "Close the frivolous shakedown lawsuit loophole." (Ballot Arguments [Pltf's Appx.], at pp. 1-3, bold italics added).

provisions and comply with the class-action procedures of Code of Civil Procedure section 382. (*Id.*, §§ 2, 5.)

Proposition 64 does not affect public officials' authority to prosecute UCL and FAL claims for the general public. (*Id.*, §§ 1(f), 1(g), 2, 3, 5.)

ARGUMENT

I. Proposition 64 Applies To Pending Cases Because It Repeals The Statutory Authority For Plaintiff's Purely Statutory Right Of Action Under The UCL Without A Saving Clause

Plaintiff maintains that Proposition 64 should not be applied to pending cases, relying on the traditional rule that new enactments generally apply prospectively and not "retroactively" without clear retroactive legislative intent. "Although the courts normally construe statutes to operate prospectively," there is a different and distinct legal rule (the Repeal Rule) that governs here: "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.'" (*Mann, supra*, 18 Cal.3d at p. 829, citation omitted.)

As *Mann* confirms, arguments based on the "traditional rule that statutory enactments are generally presumed to have prospective effect" are inapposite in cases governed by this "general common law rule" of repeal and abatement. (*Ibid.*; 7 Witkin, Summary of California Law, Constitutional Law, § 635.) Indeed, the "only legislative intent relevant" under the Repeal Rule is the existence of a "saving clause" or some other clear intent "to save" pending cases from "the ordinary effect of repeal[.]" (*Younger, supra*, 21 Cal.3d at p. 110.)

Proposition 64 applies to this pending case under the Repeal Rule because it repeals this *uninjured* Plaintiff's statutory authority to prosecute

its representative UCL claim for the "general public" (Prop. 64, § 3), *without* a saving clause or other intent to save pending cases.

A. For Over A Century, This Court Has Applied The Repeal Rule To Hold That Intervening Enactments Eliminating The Statutory Authority For Purely Statutory Rights Of Action Or Remedies Without A Saving Clause Apply Immediately To Pending Cases

In "a long and unbroken line of California decisions" reaching back more than a century, this Court has consistently applied the common law's Repeal Rule to hold that intervening enactments eliminating the statutory authorization for purely statutory rights of action or remedies without a saving clause *apply immediately* to all pending cases not involving any non-appealable final judgment. (*Mann*, *supra*, 18 Cal.3d at pp. 822, 829-831 & fn. 8; *Younger*, *supra*, 21 Cal.3d at pp. 108-110; *Wolf*, *supra*, 10 Cal.2d at pp. 184-185; accord, *Napa State Hospital v. Flaherty* (1901) 134 Cal. 315, 317-318 (*Napa State Hospital*); *People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 67, 78-79 (*Bank of San Luis Obispo*); *Southern Service Co. v. County of Los Angeles* (1940) 15 Cal.2d 1, 11-12; *International Assn. of Cleaning & Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, 423; *People v. One 1953 Buick 2-Door* (1962) 57 Cal.2d 358, 365 (*One 1953 Buick 2-Door*).)

In *Younger* and *Mann*, the Court reaffirmed the controlling force in California of this distinct rule of statutory construction – which it described as the "well settled rule that an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final" (21 Cal.3d at p. 109), and the "general common law rule" under which any ""cause of action or remedy dependent on a statute falls with the repeal of the statute, even after the action thereon is pending, in the absence of a

saving clause in the repealing statute.'" (18 Cal.3d at p. 829, citation omitted.)[3]

The Repeal Rule applies to any "amendment" or other effective "repeal" eliminating the "statutory authority" for any plaintiff's purely statutory right of action or remedy without a saving clause while a case remains pending – even if the new enactment does not repeal the entire statutory scheme. (*Younger*, *supra*, 21 Cal.3d at p. 109; *Mann*, *supra*, 18 Cal.3d at pp. 822-823, 828-831; *Wolf*, *supra*, 10 Cal.2d at pp. 184-185 ["A repeal of the statute, or an amendment thereof, resulting in a repeal of the statutory provision upon which the cause of action arose wipes out the cause of action unless the same has been merged into a final judgment."].)

The "justification" is that purely statutory rights of action and remedies "are pursued with full realization" that they may be abolished "at any time" while the case remains pending. (*Younger*, *supra*, 21 Cal.3d at p. 109, internal quotations and citations omitted; *Mann*, *supra*, 18 Cal.3d at p. 829.) Thus, no parties in California may justifiably rely on the continued availability or immutable nature of any purely statutory rights of action or remedies, because they are legally charged with knowledge that the statutory authority for such claims or remedies may be eliminated at any time prior to non-appealable final judgment. (*Ibid.*)

The California Legislature long ago codified the same fundamental rule and reason in Government Code section 9606: "Any statute may be

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[3] Following *Mann* and *Younger*, the appellate courts have repeatedly recognized that new statutory enactments triggering the Repeal Rule apply to pending cases "without triggering retrospectivity concerns." (*Brenton v. Metabolife Internat. Inc.* (2004) 116 Cal.App.4th 679, 690; accord, e.g., *Beckman v Thompson* (1992) 4 Cal.App.4th 481, 489; *Physicians Com. for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 125; *Rio Linda Union School District v. Workers' Comp. Appeals Board* (2005) 131 Cal.App.4th 517, 528.)

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 [formerly Pol. Code, § 327]; see also *Bank of San Luis Obispo*, *supra*, 159 Cal. at pp. 75-76; *Callet*, *supra*, 210 Cal. at pp. 67-68.) Like the common law's Repeal Rule, the Government Code's repeal principles apply with full force to partial repeals effectuated by an "amendment." (Gov. Code, § 9605 [whenever "a section or part of a statute is *amended*," "the *omitted portions* are to be considered as having been *repealed at the time of the amendment*," italics added].)

The Repeal Rule applies only to rights of action and remedies that are purely "statutory" in nature. (*Mann*, *supra*, 18 Cal.3d at pp. 829, 830; *Younger*, *supra*, 21 Cal.3d at pp. 109-110.) It "does not apply" to a "right of action which has accrued to a person under the rules of the *common law*" or under statutes merely "codifying" a pre-existing right of action under "the *common law*." (*Callet*, *supra*, 210 Cal. at pp. 67-68, italics added.) The basis for this distinction underlying the Repeal Rule is that – unlike a purely statutory claim – a common law claim may constitute a "vested property right" when it accrues. (*Ibid.*) Rights to any purely statutory claims or remedies are *not* "vested" until "final judgment," including exhaustion of appeals. (*Chapman v. Farr* (1982) 132 Cal.App.3d 1021, 1025 (*Chapman*); *South Coast Reg. Com. v. Gordon* (1978) 84 Cal.App.3d 612, 616, 618-19 (*Gordon*); see also *Mann*, *supra*, 18 Cal.3d at pp. 822, 828-831; *One 1953 Buick 2-Door*, *supra*, 57 Cal.2d at pp. 365-366; *Bank of San Luis Obispo*, *supra*, 159 Cal. at pp. 67, 78-80; *Napa State Hospital*, *supra*, 134 Cal. at p. 317; *County of San Bernardino v. Ranger Ins. Co.* (1995) 34 Cal.App.4th 1140, 1148-1149; *Lemon v. Los Angeles T. Ry. Co.*

(1940) 38 Cal.App.2d 659, 671, cited with approval in *Mann*, *supra*, at p. 830; cf., Gov. Code, § 9606.)[4]

Prior to non-appealable final judgment, any statutory right of action or remedy "can be abolished" by the Legislature that created them (*One 1953 Buick 2-Door*, *supra*, 57 Cal.2d at p. 365), or by the voters through the initiative or referendum process (e.g., *Wolf*, *supra*, 10 Cal.2d at pp. 184-185; *Chapman*, *supra*, 132 Cal.App.3d at pp. 1023-1025). "In case of a statute conferring civil rights or powers, the repeal operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete, and unperfected" (*Bank of San Luis Obispo*, *supra*, 159 Cal. at p. 79; accord, *One 1953 Buick 2-Door*, *supra*, at p. 365); "a repeal of the statute conferring the right, prior to final judgment, would abolish the right and place the parties in the same position as if the statute never existed." (*Krause v. Rarity* (1930) 210 Cal. 644, 653 (*Krause*).)

Accordingly, where a particular right of action does not exist at common law but rather depends solely on statute, then any intervening repeal of the statutory authority for a plaintiff's pursuit of that statutory right of action *destroys* the right of action – unless it has been reduced to non-appealable final judgment or a saving clause protects it in pending litigation. (*Napa State Hospital*, *supra*, 134 Cal. at p. 317; accord,

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[4] Plaintiff says the distinction between un-vested statutory rights of action and vested common law claims has "'no constitutional basis'" and "makes no sense." (AB at 26, fn. 6, citation omitted.) That this distinction has no *constitutional* basis is irrelevant here, where the question presented involves the governing *rule of statutory construction*. If, by questioning the "sense" of this distinction underlying the Repeal Rule, Plaintiff is effectively asking the Court to overrule *Younger*, *Mann*, and a century of California authorities applying the Repeal Rule as a rule of statutory construction in California, the request should summarily be denied. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1047 [reaffirming that "considerations of stare decisis have special force in the area of statutory construction"].)

Younger, *supra*, 21 Cal.3d at pp. 109-110; *Mann*, *supra*, 18 Cal.3d at pp. 828-832; *Wolf*, *supra*, 10 Cal.2d at pp. 184-185; *Bank of San Luis Obispo*, *supra*, 159 Cal. at pp. 67, 78-79.) Because it is a creature of statute, the right of action exists only so far and in favor of such persons as the legislative power may declare while the case remains pending. (*Ibid.*; *One 1953 Buick 2-Door*, *supra*, 57 Cal.2d at p. 365; cf., *Justus v. Atchison* (1977) 19 Cal.3d 564, 575.)

This Court has applied the Repeal Rule even where it operated to deprive plaintiffs of statutory rights of action that were viable, indeed meritorious, under the regime in place when the cases were filed.

In *Younger*, the plaintiff asserted a statutory claim to expunge his criminal records under a then-existing statutory right of action. (21 Cal.3d at pp. 107-108.) While the action was pending, "the Legislature changed the law" by way of an "amendment" that superseded the claim's statutory authorization. (*Id.*, at pp. 108-109.) Although plaintiff's claim was valid under the statutory regime when the case was filed, the "amendment" enacted while the case remained pending "effectively repealed [its] statutory authority." (*Id.*, at p. 109.) As *Younger* holds, the "only legislative intent relevant in such circumstances would be a determination to save this proceeding from the ordinary effect of repeal[.]" (*Id.*, at p. 110.) But "no such intent" appeared: the amendment had "no express saving clause" and no intent "to save" pending cases could otherwise be ascertained from contemporaneous legislation. (*Ibid.*) Thus, the Court applied the "well settled" Repeal Rule to hold that plaintiff's purely statutory action was "abate[d]." (*Id.*, at pp. 109-110.)

In *Mann*, the plaintiff school district originally obtained a trial-court ruling that a teacher's marijuana conviction provided grounds for dismissal under the Education Code. (18 Cal.3d at pp. 821-823, 828-829.) While the

case was pending on appeal, the Legislature enacted a Health and Safety Code provision that, "by necessary implication," partially repealed the Education Code provision without a saving clause, and thereby *eliminated* the statutory basis for plaintiff's claim. (*Ibid.*) Because plaintiff's right of action "rest[ed] solely on statutory grounds," the "repeal" of its "statutory authority" without a saving clause "necessarily defeat[ed]" the action "at the time the repeal became effective." (*Id.* at 830-831 ["'If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards,'" and the "'court must dispose of the case under the law in force when its decision is rendered,'" citation omitted].) This result was based on the "long and unbroken line of California decisions" under the Repeal Rule "establish[ing] beyond question that the repeal of [plaintiff's] statutory authority" for its right of action "does affect the present action," which remained pending when the repeal went into effect. (*Id.* at p. 822.)

The Court rejected the contention that the intervening repeal should not affect plaintiff's case because it "was pending" and "statutory enactments are generally presumed to have [only] prospective effect" – holding that "[a] long well-established line of California decisions conclusively refutes plaintiff's contention." (*Id.*, at pp. 828-829.) Notwithstanding this "traditional rule" plaintiff tried to invoke, such anti-retroactivity arguments disregarded the *distinct* legal rule that controlled the case. (*Id.*, at p. 829.) Applying the common law's Repeal Rule, the Court explained that although the Health and Safety Code amendments enacted while the case remained pending effected only a "limited repeal of the former statute," they "worked a direct repeal of [plaintiff's] statutory authority" for its purely statutory action. (*Id.*, at p. 828.) Even if the law when the suit was filed "formerly authorized" plaintiff's claim, "the new legislation" enacted without a saving clause while the case was pending

"repealed such statutory authority." (*Id.*, at p. 822.) Thus, plaintiff's pending case failed under the Repeal Rule. (*Id.* at pp. 822-823, 828-831.)

In *Wolf*, the Court also applied the Repeal Rule to hold that an intervening "amendment" applied immediately to a plaintiff's pending statutory usury action. (10 Cal.2d at pp. 183-185.) Plaintiff sought treble damages under the 1918 statutory usury laws in effect on the dates of plaintiff's loan transactions with defendant. (*Id.*, at p. 184.) In 1934, the usury statutes were modified by a voter-enacted amendment without a saving clause. (*Id.*, at pp. 184-185.) Although the amendment "did not repeal the usury law of the state," it caused "some radical changes to be made" that *eliminated* the statutory authorization for plaintiff's claim against the defendant. (*Id.*, at p. 184.) The Court held that, under the Repeal Rule, the amendment "wipe[d] out" plaintiff's claim because it had not "been merged into a final judgment." (*Id.*, at pp. 184-185.)

The result in these cases is based on the "ordinary effect of repeal" under the common law's Repeal Rule. (*Younger*, *supra*, 21 Cal.3d at p. 110.) That ordinary "effect" of repeal is "to obliterate" the former statutory provision as if it "never existed, except [for those actions] ... concluded whilst it was an existing law." (*Napa State Hospital*, *supra*, 134 Cal. at pp. 317-318, citation and quotations omitted.)

B. Proposition 64 Applies Here Because All The Elements Of The Repeal Rule Are Satisfied

As in *Younger* and this Court's other Repeal Rule cases, "[e]ach element of the rule" is met here. (21 Cal.3d at pp. 109-110.)

First, any conceivable "right" that Plaintiff might have to prosecute the UCL claim it asserts for the general public *depends entirely on a statutory basis* under section 17204. Thus, any such right of action is "wholly dependent on statute" (*Younger*, *supra*, 21 Cal.3d at p. 109) and

"rests solely on a statutory basis" (*Mann, supra*, 18 Cal.3d at p. 829). The statutory authority for private plaintiffs – including *uninjured* persons – to prosecute UCL claims for the "general public" was first added by the Legislature in 1933 to the UCL's predecessor, Civil Code section 3369, and then carried over into the UCL. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129-30 (*Kraus*), citing Stats. 1933, ch. 953, § 1, p. 2482; *Stop Youth Addiction, supra*, 17 Cal.4th at pp. 561-562; *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109-110.) No standing for *uninjured* persons to prosecute unfair competition claims for the general public, or at all, existed at common law.

Second, the "statutory authority" (*Younger, supra*, 21 Cal.3d at p. 109; *Mann, supra*, 18 Cal.3d at pp. 822, 826) for this uninjured Plaintiff to prosecute any UCL claim for the "general public" has been *repealed* by the voters: Proposition 64 *strikes* from section 17204 the former authority for any private person to prosecute UCL claims "acting for the interests of itself, its members or the general public." (Prop. 64, § 3; compare *Stop Youth Addiction, supra*, 17 Cal.4th at pp. 560-561 [interpreting that language to authorize uninjured persons to prosecute UCL claims].)

Third, when Proposition 64 took effect, this action remained *pending* and had not been litigated to any non-appealable final judgment. Hence, no rights under the UCL had vested in Plaintiff. (*Mann, supra*, 18 Cal.3d at p. 829; *Chapman, supra*, 132 Cal.App.3d at p. 1025; *Ante*, at pp. 9-10 [citing cases].) Any such "rights" were "inchoate, incomplete, and unperfected." (*One 1953 Buick 2-Door, supra*, 57 Cal.2d at p. 365 ["the test to be applied in determining the effect to be given to the repeal is not whether the changes in the law are 'substantive' or 'procedural' but rather whether the rights affected are 'vested' or 'inchoate,'" citation omitted].)

Fourth, there is no "saving clause" in Proposition 64. (*Younger*, *supra*, 21 Cal.3d at p. 109; *Mann*, *supra*, 18 Cal.3d at p. 829 [any "'cause of action or remedy dependent on a statute falls with the repeal of the statute, even after the action thereon is pending, *in the absence of a saving clause in the repealing statute*,'" italics added, quoting *Callet*, *supra*, 210 Cal. at pp. 67-68].) Plaintiff points to no evidence that the voters otherwise intended "to save" pending cases from "the ordinary effect" of Proposition 64's "repeal" of the authority for private parties, including the uninjured, to prosecute UCL claims for the general public. (*Younger*, *supra*, at p. 110.) Given the absence of any saving clause or other clear electorate intent to save pending pre-Proposition 64 UCL actions from the ordinary effect of repeal, Proposition 64 applies to all pending cases – including this one – under the Repeal Rule.[5]

C. Plaintiff's Arguments Against Application Of Proposition 64 To Pending Cases Under The Repeal Rule Are Meritless

1. Proposition 64's Elimination Of The Authority For Plaintiff To Prosecute Any UCL Claim Constitutes An Effective "Repeal" Under California Law

According to Plaintiff, Proposition 64 cannot apply to this pending case under the Repeal Rule because (i) the enactment is styled as an "amendment"; (ii) it does not repeal the entire UCL statutory "cause of action" or its remedies in all circumstances; (iii) it supposedly does not repeal "any part" of the UCL; and (iv) the policies underlying the Repeal Rule supposedly have no application here. (AB at 27-31.) These arguments are meritless.

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[5] Plaintiff's argument that the Business and Professions Code is exempt from the Repeal Rule by virtue of the supposed existence of a "two-part saving clause" (AB at 4, 40) is refuted *Post*, at pp. 27-34.

First, under the Repeal Rule, the fact that Proposition 64 *amends* the UCL and does not repeal the entire UCL statutory scheme is irrelevant. The Repeal Rule applies to new enactments framed as "amendment[s]" to a pre-existing statutory scheme – so long as they effectively repeal the "statutory authority" for the plaintiff to maintain its pending and purely statutory right of action without a saving clause. (*Younger*, *supra*, 21 Cal.3d at pp. 109-110 [Repeal Rule applied to "amendment" that undermined "statutory authority" for plaintiff's pending statutory action, even though it did not repeal entire statutory scheme]; *Mann*, *supra*, 18 Cal.3d at pp. 822, 828-831 [Repeal Rule applied to amendment effecting a "limited repeal" "by implication" of existing statute in manner that "modified the governing statutory scheme" to eliminate "statutory authority" for plaintiff's pending statutory claim]; *Wolf*, *supra*, 10 Cal.2d at pp. 184-185 [Repeal Rule applied to voter-enacted "amendment," which did not entirely "repeal" the "usury law of the state," because it eliminated statutory authority for plaintiff's pending claim]; compare *Krause*, *supra*, 210 Cal. at pp. 651-652, 654-655 [Repeal Rule not applied where amendment did *not* "repeal" plaintiffs' authority to "maintain" their purely statutory action against defendant, but merely altered the "proof required, not to maintain the action, but to permit a recovery"].)

Second, Plaintiff is wrong to contend that a new enactment must *entirely* repeal a statutory right of action or remedy *in all circumstances* for the Repeal Rule to apply. Under this Court's authorities, the distinctive feature triggering the Repeal Rule is the elimination of the "statutory authority" for the *plaintiff's* purely statutory right of action or remedy without a saving clause while the case remains pending. (*Younger*, *supra*,

21 Cal.3d at pp. 109-110; *Mann, supra*, 18 Cal.3d at pp. 828-831.)[6] That is precisely what Proposition 64 does to this *uninjured* Plaintiff's statutory authority to prosecute any UCL claim for the "general public." (Prop. 64, § 3.) Under the Repeal Rule, it does not matter that Proposition 64 preserves the authority for *public officials* to prosecute UCL claims for the general public, and the authority for *injured* private persons to prosecute UCL claims on an individual or (if appropriate under C.C.P. § 382) class-wide basis. (Prop. 64, §§ 2, 3.) Rather, it is dispositive that Proposition 64 repeals the statutory authority for *this uninjured Plaintiff* – and *all* uninjured private plaintiffs – to prosecute UCL claims.

Third, Plaintiff's assertion that Proposition 64 does not "repeal" any "part of the UCL" (AB at 1, 6) is utterly baseless. Proposition 64's *deletion* from section 17204 of the former authority for any private person to prosecute UCL claims "acting for the interests of itself, its members or the general public" (Prop. 64, § 3) clearly constitutes an effective *repeal* under the Repeal Rule. Plaintiff's suggestion that Proposition 64 does not effect any repeal for purposes of Government Code section 9606 (AB at 28-29) ignores Government Code section 9605, which provides that where a new enactment "amend[s]" all "or part of" any pre-existing statute, "the omitted portions are to be considered as having been *repealed* at the time of the amendment." (Gov. Code, § 9605, italics added.)[7]

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[6] (See also *One 1953 Buick 2-Door, supra*, 57 Cal.2d at pp. 360-366 [applying Repeal Rule even though new amendment did not abolish all statutory-vehicle-forfeiture claims but permitted them only if specified "conditions" met; rejecting argument that Repeal Rule did not apply "since the provision for forfeiture was not repealed in its entirety"]; *Wolf, supra*, 10 Cal. 2d at pp. 184-85 [applying Repeal Rule even though voters' amendment did not "repeal" statutory usury claims in all circumstances].)

[7] The court in *Consumer Advocacy Group, Inc. v. Kintetsu Enters. of America* (2005) 129 Cal.App.4th 540 (*Consumer Advocacy*) – cited by

Fourth, while Plaintiff contends that the "policy" rationale underlying the Repeal Rule and Government Code section 9606 should limit its application to cases analogous to criminal and quasi-criminal contexts (AB at 29-31), "a host of California cases" hold that the broad "reach" of the Repeal Rule includes *civil* cases and "has never been confined solely to criminal or quasi-criminal matters." (*Mann*, *supra*, 18 Cal.3d at pp. 829-830 & fn. 8; 7 Witkin, Summary of California Law, Constitutional Law § 635, at p. 1037 [Repeal Rule "has broad application" to "civil" as well as "criminal" or "quasi-criminal" statutes].)

Plaintiff's contentions are also contrary to the settled policy "justification" for the Repeal Rule and Government Code section 9606 – which is that all purely statutory rights of action and remedies are pursued with *full realization* they may be abolished at any time while the case remains pending (*Mann*, *supra*, 18 Cal.3d at p. 829; *Callet*, *supra*, 210 Cal. at pp. 67-68), and persons acting under any statute *act in contemplation* of the fact that the basis for their pending statutory right of action may be eliminated by amendment or other effective repeal. (Gov. Code, §§ 9606, 9605.) Accordingly, Plaintiff's "reliance," "settled expectations," and related "fairness" arguments here are legally unfounded. (AB at 13, 47-48.)

Finally, Plaintiff's assertion that the Repeal Rule applies only where there is a clear intention "to repeal" (AB at 31) the statutory provision at issue gets Plaintiff nowhere: By explicitly *striking* the authority for uninjured private parties to prosecute UCL claims, the voters in Proposition 64 unambiguously expressed their "intent to *repeal*" (AB at 31, italics

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Plaintiff – clearly erred by failing to recognize that Proposition 64 effects an operative "repeal" under Government Code sections 9606 and 9605 (the latter of which is neither cited or considered by the court), and under *Younger* and *Mann*.

added) the statutory authority this uninjured Plaintiff relies upon for its UCL claim.

2. Plaintiff Is Wrong To Assert That, Even Under The Repeal Rule, No New Enactment Applies To Pending Cases Without An Express Retroactivity Provision Or Other Clear Expression Of Retroactive Legislative Intent

Plaintiff incorrectly relies on *traditional* "retroactivity" analysis to contend that Proposition 64 should not be applied to pending cases because it lacks any express retroactivity provision or other clear evidence of a retroactive legislative intent. (AB at 1-4, 7, 10-25, 28-40.) Where the authority for a plaintiff's purely statutory right of action has been repealed *without a saving clause*, such repeals apply immediately to pending cases under the Repeal Rule without running afoul of any retroactivity principles. (See *Ante*, at pp. 6-13.)

Plaintiff's assertion that the Repeal Rule "does not alter" the traditional presumption against retroactive application of new statutory enactments (AB at 3) is incorrect. *Mann* conclusively rejects the contention that cases involving a repeal of the statutory authority for purely statutory rights of action should be governed by "traditional" retroactivity analysis (18 Cal.3d at pp. 828-829, 830-832), and *Younger* confirms that the "*only* legislative intent relevant" under the Repeal Rule is the existence of a "saving clause" or some other clear intention "to save" pending cases from "the ordinary effect of repeal illustrated in cases such as *Mann*." (21 Cal.3d at p. 110, italics added.)

Plaintiff asserts that the Court in *Younger* and *Mann* applied the Repeal Rule only "after" holding that the new statutes at issue clearly expressed a retroactive legislative intent that they be applied to pending cases (AB at 33-35), but that too is incorrect. The legislative history

reference in *Younger* on which Plaintiff fastens (AB at 35) dealt with a different issue: the proper interpretation of the administrative procedure replacing the now-repealed one, which the Court discussed in a separate section of the opinion only *after* it had *already held* that the new amendment applied to pending cases under the Repeal Rule. (21 Cal.3d at pp. 109-110, 111-113.) *Mann*'s reference to the purpose of the new enactment was in support of the Court's conclusion that the Legislature *implicitly repealed* the statutory right of action for school boards to dismiss teachers for certain marijuana convictions (18 Cal.3d at pp. 827-828), and *not* (as Plaintiff contends) in support of any finding that the Legislature clearly expressed a "retroactive" intent to apply its new provisions to pending cases.

Thus, Plaintiff is wrong to assert that the relevant legislative intent inquiry is whether the voters, or the drafters of the initiative, sufficiently indicated a "retroactive" intent to apply Proposition 64 to pending cases. (AB at 2-3, 25.) Under this Court's other Repeal-Rule cases, it is the absence of a *saving clause* or any other clear *intent to save* pending cases from the ordinary effect of repeal that is both the beginning and the end of the only relevant legislative-intent analysis here. (*Ante*, at pp. 6-13, 15.)[8]

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[8] Plaintiff's argument based on an e-mail from one of the initiative's two sponsors to a voter about whether the sender believed Proposition 64 would be "retroactive" (AB at 7, 21) is simply inapposite – because it does *not* go to the "relevant" issue of whether Proposition 64 contains any "saving clause," nor whether there is any other clear electorate intent "to save" pending cases from the ordinary effect of repeal. (*Younger*, *supra*, 21 Cal.3d at p. 110.) Plaintiff's argument also fails because the proffered e-mail to a *single* voter is not competent evidence of any *collective* voter intent. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 904 [any "opinion" of the "drafters" or "sponsor[s]" of "an initiative is not relevant" to collective legislative intent where not communicated to entire "'body which adopted the statute,'" citation omitted]; *Metropolitan Water Dist. of So. Cal. v. Imperial Irrig. Dist.* (2000) 80 Cal.App.4th 1403, 1426

Plaintiff then cites several decisions after *Younger* and *Mann* to suggest that they implicitly abandoned or limited the century-old Repeal Rule (AB at 35-40), but the suggestion is untenable. Plaintiff confuses the distinct rules this Court has consistently applied in analyzing the application of new statutory enactments to pending cases. As *Younger* and *Mann* confirm, intervening enactments that repeal the statutory authority for purely statutory rights of action and remedies without a saving clause apply immediately to pending cases under the Repeal Rule. (*Ante*, at pp. 1-3, 6-13.) *None* of Plaintiff's cited cases involved new enactments that repealed the statutory authority for any purely statutory action. Those cases involve circumstances, entirely inapposite here, in which application of new statutes to pending cases would have (1) imposed *new and additional liabilities* on *defendants* based on their past conduct (*Myers v. Philip Morris Cos. Inc.* (2002) 28 Cal.4th 828 (*Myers*); *McClung v. Employment Devel. Dept.* (2004) 34 Cal.4th 467 (*McClung*); *Elsner v. Uveges* (2004) 34

[materials concerning any "understanding" of a "bill's author" are properly disregarded because they do not constitute "evidence of the Legislature's collective intent"]; *C-Y Devel. Co. v. City of Redlands* (1982) 137 Cal.App.3d 926, 932 [applying "general rule" that "views of individual drafters" of ballot propositions "are not considered as grounds upon which to construe a statute" where not communicated to entire voting public prior to enactment].) *Hermosa Beach Stop Oil Coalition v. Hermosa Beach* (2001) 86 Cal.App.4th 534, 551 (see AB at 21) is not to the contrary, because all the drafters' "intent" materials at issue there *were* presented to *entire electorate* in the initiative's ballot arguments and accompanying materials. In *City of Long Beach v. Dept. of Indus. Relations* (2004) 34 Cal.4th 942 – also cited by Plaintiff – the Court considered Senator Burton's letter as probative of the "Legislature's *collective* intent" because it was "presented ... to the full Senate" immediately prior to the Senate's vote enacting the bill, and also ordered "printed" by the Senate resulting in its inclusion as relevant legislative history in the Labor Code's annotations. (*Id.*, at p. 952, italics in original.) An e-mail to one voter a month before the election, and *not* disseminated to the entire voting public, does not present the exceptional circumstances in *City of Long Beach*.

Cal.4th 915 (*Elsner*)); (2) interfered with plaintiffs' *vested* rights in their accrued common law claims, disability-retirement benefits, or community property rights (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 (*Evangelatos*); *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148 (*Cole*); *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26 (*Droeger*); *Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590 (*Hoffman*)); or (3) excluded pre-hypnotic evidence obtained several years before a new Evidence Code provision took effect. (*People v. Hayes* (1989) 49 Cal.3d 1260 (*Hayes*)). The Repeal Rule was not mentioned in these cases because *none* of them implicated that distinct rule on their facts. Consequently, those cases cannot be read as abandoning or overruling the "long well-established line of California decisions" (*Mann, supra*, 18 Cal.3d at pp. 828-829) in which this Court has consistently applied the "well settled" Repeal Rule. (*Younger, supra*, 21 Cal.3d at p. 109.)

Plaintiff relies heavily on *Myers, supra*, 28 Cal.4th 828 – emphasizing that the Court did not apply the Repeal Rule and instead held the new "repeal" statute at issue could not be applied retroactively without clear retroactive legislative intent. (AB at 11, 18-19, 36-38.) But *Myers* involved the 1998 repeal of a statutory "immunity" defense formerly afforded cigarette companies under Civil Code section 1714.45. That feature brought the 1998 repeal statute in *Myers* within the distinct rule – not applicable here – that, absent clear legislative intent, a statute may not be applied "retroactive[ly]" so as to change the legal effects of defendant's past conduct by making "tortious" conduct that was "lawful" at the time it occurred. (28 Cal.4th at pp. 839-840 [such "application" would be "retroactive" by "subject[ing]" defendant "to 'liability for past conduct'" that was "lawful" when committed, citation omitted].) The Court failed to invoke or apply the Repeal Rule because the case, on its facts, simply did

not implicate the "well settled rule" that any "*action wholly dependent on statute* abates if the statute is repealed without a saving clause before the judgment is final." (*Younger*, *supra*, 21 Cal. 3d at p. 109, italics added; accord, *Mann*, *supra*, 18 Cal.3d at p. 829 [Repeal Rule applies where "pending action" "rests solely on a statutory basis" that is repealed].)[9]

Similarly, the Repeal Rule was not implicated in *McClung* or *Elsner*, cited by Plaintiff. Neither involved any intervening enactment repealing the authority for any purely statutory right of action or remedy. Both involved the different circumstance in which new statutes would *impose new and additional liabilities* on *defendants* based on their *underlying past conduct* – which, unlike here, precluded application of the new enactments to pending cases without clear retroactive legislative intent. (*McClung*, *supra*, 34 Cal.4th at pp. 469-70, 476-77 [holding that new amendment, which "impose[d] personal liability on persons" for "actions not subject to liability when performed," could not be applied to defendant's pre-enactment conduct]; *Elsner*, *supra*, 34 Cal.4th at pp. 923-924, 936-939 [amendments altering standard of care cannot be applied to make defendant liable for past conduct that may have satisfied applicable standard of care when defendant acted].)

Plaintiff's extensive reliance on *Evangelatos*, *supra*, 44 Cal.3d 1188, is equally misplaced. The Repeal Rule was not implicated in *Evangelatos* because that case, which involved only *common law* claims, also involved no repeal of the authority for any purely statutory right of action or remedy while the case remained pending. Unlike Proposition 64's application to Plaintiff's purely statutory claim here, *Evangelatos* addressed the

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[9] There is no inconsistency in the California Chamber of Commerce's arguments here and in *Myers*. (Compare AB at 22-23.) The Chamber has merely invoked *two distinct legal rules* in the different contexts in which each rule properly applies.

applicability to pending cases of Proposition 51 – an initiative that "modified the traditional, common law 'joint and several liability' doctrine" and effected radical changes to pending "common law" claims "which accrued prior to the effective date of the initiative measure." (*Id.* at pp. 1192-1193, 1196, 1198-1199, 1205; *id.*, at p. 1225 [emphasizing the "substantial and significant change" Proposition 51 made to "long-standing *common law* doctrine applicable to all negligence actions," italics added].) The *Evangelatos* defendant sought to apply Proposition 51's changes to accrued common-law claims (*ibid.*), which would have interfered with plaintiffs' "vested property right" in "accrued" claims "under the common law." (*Callet, supra*, 210 Cal. at pp. 67-68.) Plaintiff has no comparable right in its purely statutory UCL claim; rights to purely statutory claims are not vested until non-appealable final judgment. (*Ante*, at pp. 9-10.)[10]

Moreover, the Court in *Evangelatos* refused to apply Proposition 51's new joint-and-several liability rules to pending cases where "both plaintiffs and defendants" had taken "irreversible actions" and changed their positions in "reasonable reliance" on the then-existing state of the common law prior to Proposition 51's enactment. (44 Cal.3d at pp. 1225-

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[10] Plaintiff's reliance on *Cole*, *Droeger* and *Hoffman*, is misplaced for the same reason. These cases involved distinguishable contexts in which application of the new statutory enactments to pending cases would have interfered with rights deemed "vested" under settled California law – such as (i) spousal community property rights in *Droeger*, *supra*, 54 Cal.3d at pp. 42-43 (see *In re Bouquet* (1976) 16 Cal.3d 583, 591-592 [spouses have "vested property rights" in community property]; (ii) disability retirement benefits in *Hoffman*, *supra*, 42 Cal.3d at pp. 591-592 (see *Dickey v. Retirement Bd.* (1976) 16 Cal.3d 745, 748 ["well settled that retirement benefit rights" "are vested" "upon acceptance of employment"]; and (iii) the "common law" claim for intentional infliction of emotional distress at issue in *Cole*, *supra*, 43 Cal.3d at p. 151, 155 (see *Callet*, *supra*, 210 Cal. at pp. 67-68 [unlike purely statutory claims, common law claims are "vested" property rights when they accrue]).

1226 & fn. 26; accord, *Tapia, supra*, 53 Cal.3d at p. 290 [emphasizing this aspect of *Evangelatos*].) By contrast here, Plaintiff was legally charged with notice – under the Repeal Rule and Government Code section 9606 – that the statutory basis for its purely statutory UCL right of action may be repealed at any time. Hence, unlike in *Evangelatos*, any claimed reliance by this uninjured Plaintiff on the continued vitality of the statutory authority for its UCL representative right of action on behalf of the general public was *legally unjustified*. (*Ante*, pp. 7-13, 18-19.)

Finally, Plaintiff is incorrect to contend that *Landgraf v. USI Film Products* (1994) 511 U.S. 244 (*Landgraf*), and *I.N.S. v. St. Cyr* (2001) 533 U.S. 289 (*St. Cyr*), compel the conclusion that Proposition 64 cannot apply to pending cases under the common law's Repeal Rule without clear retroactive legislative intent. (AB at 13-14, 15, 18, 39.) While Plaintiff relies heavily on *Landgraf*, the Supreme Court in that case articulated the analysis that applies "[w]hen a case implicates a *federal statute* enacted after the events in suit." (511 U.S. at p. 280, italics added.) *Landgraf* does not pronounce mandatory principles of statutory construction state courts must follow in all circumstances under their respective state laws. The suggestion that *Landgraf* requires this Court to modify its analysis in *Mann* and *Younger* is further undermined by the fact that the Repeal Rule does not apply to federal statutes. Unlike California law, the general provisions of the U.S. Code have, for over 130 years, contained a *federal general saving clause* – which provides that a "repeal of any statute shall not have the effect to release or extinguish any ... liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such ... liability." (1 U.S.C. § 109; see also *Korshin v. Commissioner* (4th Cir. 1996) 91 F.3d

670, 673.) Thus, it is not surprising that *Landgraf* alludes to the Repeal Rule only in passing, followed by the citation: "But see 1 U.S.C. §109 (repealing common-law rule)." (511 U.S. at pp. 270-271.)[11] Given *Landgraf*'s recognition that Congress abrogated the Repeal Rule with respect to federal statutes, it is implausible to read that decision as resolving any "seeming conflict" under state law (*Californians For Disability Rights v. Mervyn's LLC* (Feb. 1, 2005) A106199, review granted ["Slip Op."], at p. 6) regarding the proper application of the Repeal Rule in states – such as California – that adhere to the "general common law rule." (*Mann, supra*, 18 Cal.3d at pp. 829-830.)

3. Plaintiff's Assertion That The UCL Is "Derived" In Part From The "Common Law" Does Not Prevent Proposition 64's Application Here Under The Repeal Rule

In a footnote, Plaintiff tries to invoke the Repeal Rule exception recognized in *Callet*, which applies only to repeals that affect "common law" claims or claims under a statute that merely "codif[ied]" a pre-existing "right of action" at "common law." (210 Cal. at pp. 67-68.) Plaintiff incorrectly suggests that *Callet*'s exception should apply if the Court concludes that the UCL "is derived" at least in part "from common law." (AB at 26, fn. 6.) The suggestion disregards the relevant aspect of the UCL repealed by Proposition 64: section 17204's standing language that had permitted *uninjured* private parties to prosecute UCL claims for the general public.

Callet's exception applies to the repeal of statutes "codifying" a pre-existing "right of action" that existed in the same form at "common law."

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[11] Because Congress had abrogated the common law's Repeal Rule as applied to federal enactments (1 U.S.C. § 109), the Court in *St. Cyr* had no occasion to cite or discuss the common law's rule.

(210 Cal. at pp. 67-68.) Its test focuses on whether the "right of action" repealed while the case was pending "is a right recognized at common law" or "a right based entirely on statute." (*Id.* at pp. 67-70 [repeal of statutory "right" for vehicle guests to sue negligent drivers did not require dismissal of pending claim where same "right" existed under common law].)[12]

Here, the now-repealed "right of action" for uninjured persons to prosecute UCL claims was dependent on section 17204, and thus was "based entirely on statute." (*Ibid.*) No right of action for uninjured persons to prosecute unfair competition claims was "recognized at common law." (*Id.* at pp. 67-68.)[13] Because the UCL right of action that Proposition 64 repealed was *not* a "codif[ication]" of any pre-existing "right of action" recognized at "common law" (*id.*, at pp. 67-68; see also *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181, fn. 9 [rejecting contention that California's statutory unfair competition law "did nothing more than codify the common law"]), *Callet*'s Repeal-Rule exception does not apply.

4. There Is No "Saving Clause" In Proposition 64 Or The Business And Professions Code That Abrogates The Common Law's Repeal Rule Here

Proposition 64 contains no express "saving clause." Nor does Plaintiff point to evidence that the voters actually intended "to save"

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[12] Repeal of statutes codifying common-law claims do not extinguish pending cases because – unlike here – the same claim's common-law basis remains despite the repeal. (*Callet*, *supra*, 210 Cal. at pp. 67-70; accord, *Cross v. Bonded Adjustment Bureau* (1996) 48 Cal.App.4th 266, 275 [repeal of statutory basis for fiduciary-duty claim did not affect claim's common-law basis].)

[13] *People ex rel. Mosk v. National Research Co.* (1962) 201 Cal.App.2d 765 – cited by Plaintiff – nowhere states or even suggests that the statutory UCL right of action for *uninjured* persons (repealed by Proposition 64) was a mere codification of common law.

pending cases from Proposition 64's repeal. (*Younger*, *supra*, 21 Cal.3d at p. 110; cf., *People v. Rossi* (1976) 18 Cal.3d 295, 299-300, 303-304 (*Rossi*) [Repeal Rule governs "in the absence of clear legislative intent to the contrary" through provision that "demonstrates a legislative intent to alter the established common law rule relating to abatement"].) Instead, Plaintiff asks the Court to imply an intent to save pending cases from Proposition 64, based on its assertion that the entire Business and Professions Code is exempt from the Repeal Rule by virtue of a supposed "two-part saving clause." (AB at 4, 40.) This argument is meritless.

Plaintiff's "two-part saving clause" argument is based on a misreading of sections 4 and 12 of the Business and Professions Code. Separately or together, these sections bear no resemblance to the language employed in those statutes that this Court has held to be "clothed" in the "apt language" needed to qualify as a general "saving clause" that could abrogate the common law's Repeal Rule today. (*People v. McNulty* (1892) 93 Cal. 427, 437 (*McNulty*); *Peterson v. Ball* (1931) 211 Cal. 461, 475 (*Peterson*).)[14]

Section 4 provides: "No action or proceeding commenced *before this code takes effect*, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." (Italics added.) As Plaintiff

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[14] The Legislature knows how to write general saving clauses that apply to *future* repeals or amendments to any *part* of a code or statute when that is its genuine intent. Unlike sections 4 and 12, there are several provisions employing the broad and clearly worded language that, under *McNulty* and *Peterson*, is necessary to qualify them as genuine "general" saving clauses. (Compare Fin. Code, § 117; Corp. Code, § 102(c) [formerly Civ. Code, § 404]; Gov. Code, § 9608 [formerly codified in Pol. Code, § 327]; cf., 1 U.S.C. § 109; see also *McNulty*, *supra*, 93 Cal. at pp. 437-438; *Peterson*, *supra*, 211 Cal. at p. 464; *In re Dapper* (1969) 71 Cal.2d 184, 188-189.)

acknowledges, section 4 cannot *itself* constitute any general "saving clause" applicable today (hence the need for Plaintiff's "two-part" argument). Rather, section 4 by its terms established a limited saving clause that operated in the past to preclude application of the original provisions of the Business and Professions Code to only those subsisting rights accrued and cases commenced "before this code takes effect" – which was on August 27, 1937. (See Stats. 1937, ch. 399, at p. 1230; *Sobey v. Maloney* (1940) 40 Cal.App.2d 381, 388-390 [Section 4 "saves prosecutions for offenses committed prior to August, 1937, although complaints were not filed until after that date"].) [15]

Like similar provisions in other codes and enactments, section 4 served to exempt cases commenced and rights accrued before the effective date of the *original* enactment. (See *In re Dapper* (1969) 71 Cal.2d 184, 188-189 [finding it "patently clear" that provision included in the initial codification of San Diego's Municipal Code, pertaining to violations "'committed prior to the effective date'" of the Code, operated to save *only* those actions involving violations "occurring before" the original "adoption of the code" and did not apply to future cases involving violations of "ordinances comprising the code which are subsequently repealed"]; *Pohle v. Christian* (1942) 21 Cal.2d 83, 88 [construing language in section 231 of the Civil Service Act of 1937, virtually identical to Bus. & Prof. Code § 4 and adopted the same year, as applying to subsisting rights and cases commenced before enactment's "effective date" in 1937]; *Sacramento Terminal Co. v. McDougall* (1912) 19 Cal.App. 562, 566 [construing Civ.

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[15] The correctness of this interpretation is confirmed by review of the surrounding provisions. Section 4 is one of the several preliminary provisions at the beginning of the Business and Professions Code that established *transitional rules* to ensure that the original 1937 codification of the Code, and its related repeals, did not alter *then-existing* rights in August 1937. (Bus. & Prof. Code, §§ 3, 6, 7.)

Code § 6, similar to Bus. & Prof. Code § 4, as saving those "proceedings pending at the time of the adoption of the code" from new code's provisions]; *James v. Oakland Traction Co.* (1909) 10 Cal.App. 785, 797 [construing Pol. Code § 8, also similar to Bus. & Prof. Code § 4, as "no doubt enacted" to prevent newly enacted Code from interfering with rights subsisting when Code was originally adopted].)

Moreover, any effort to portray section 4 standing alone as establishing a "general" saving clause applicable today would fail under *McNulty* and *Peterson*. *McNulty* instructs that a provision can qualify as a general saving clause – and thereby abrogate the common law's Repeal Rule on a going-forward basis – only if "it be clothed in apt language to express [such a] purpose." (93 Cal. at p. 437.) *Peterson* confirms that it must be "plain from the language" of the provision "that it is intended to apply to the *amendment or repeal of any part*" of the statute or code at issue, not just the original enactment itself. (211 Cal. at p. 475, italics added.) That, of course, is precisely what section 4 does *not* do. Section 4 refers only to those subsisting rights or cases pending on the date "this code takes effect" in August 1937. It contains *no* "apt language" (*McNulty*, *supra*, 93 Cal. at p. 437) demonstrating any intent to save *future* suits that might be pending on the effective date of some *subsequent* repeal of some portion of the code. In fact, because section 4 was enacted six years after this Court's decision in *Peterson*, the absence of the requisite additional language making "plain" that section 4 was "intended to apply to the amendment or repeal of any part" of the Business and Professions Code (211 Cal. at p. 475) confirms that the Legislature did *not* intend section 4 to constitute a general saving clause.[16]

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[16] Plaintiff misinterprets one sentence of dicta in *Sobey v. Maloney*, *supra* (AB at 41, fn. 10). *Sobey* is a 1940 appellate decision involving

Accordingly, Plaintiff's "two-part saving clause" argument depends entirely on the contention that section 12 operates to transform section 4's inapplicable and limited saving clause into a "general" saving clause under *McNulty* and *Peterson* – and thereby exempts the entire Business and Professions Code from the scope of the common law's Repeal Rule today. That contention is frivolous.

Section 12 provides that "[w]henever any reference is made to any portion of this code or of any other law of this State, such reference shall apply to all amendments and additions thereto now or hereafter made." Section 12 thus ensures that *cross-references* within the Business and Professions Code to "any portion of the code" or to "any other law of this State" will be understood to refer to the *then-current version* of the cross-referenced statute that is adopted and incorporated by reference. Section 12 was *not* enacted to abrogate the common law's Repeal Rule, but rather to abrogate the common law's strict rules about "reference statutes." (S.A. Baxter, Reference Statutes: Traps for the Unwary, 30 McGeorge L.Rev.

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prosecution of a doctor for performing criminal abortions between 1934 and March 1937, prior to the August 1937 codification of the Business and Professions Code. (40 Cal.App.2d at p. 383.) In dicta, the court reasoned that section 4 operated as a limited saving clause applicable *only* to those pending cases or rights accrued *prior to August 1937* when the code took effect – including the right to prosecute defendant Sobey for his pre-August 1937 criminal abortions – if the Legislature in 1937 or subsequent sessions amended the law in a substantial manner that might otherwise affect *those 1937-subsisting rights and cases*. (*Id.*, at pp. 388-389.) *Sobey* did not decide – nor have any occasion to decide – whether section 4 operated as a general saving clause under *McNulty* and *Peterson* (neither of which *Sobey* even cites) regarding what effect *subsequent repeals* of *any part* of the Business and Professions Code would have on rights accrued in cases commenced *long after* the Code originally took effect. In fact, *Sobey* holds that the case was governed by section 2 (not section 4), because section 2 operates "as a saving clause where no substantial change was made in the law" and the provision pertinent to Sobey's case had not been changed by enactment of the Code. (*Id.*, at pp. 384-391.)

562, 563-564, 568-570 (1999) [Bus. & Prof. Code § 12 is one of California's "reference statute construction laws" applicable to a "statute that cross-references another law" and "adopts within itself the provisions of the cross-referenced law"]; compare *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59 [at common law, where "a statute adopts by specific reference the provisions of another statute" or law, "such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified"].) Section 12 has no application here, because section 4 does *not* adopt or incorporate by "reference" any "portion of this code" or "any other law." (Bus. & Prof. Code, § 12.) Rather, the word "code" appears in the specific context of section 4's phrase "before this code takes effect" – which the Legislature employed to identify what subsisting cases and rights were unaffected by the original adoption of the Business and Professions Code and its related repeals in 1937.[17] Section 4's phrase "before this code takes effect" thus references *a particular point in time*: the fixed date on which the code took effect in August 1937. Nothing in section 12 or its history suggests that section 4's use of the word "code" in the phrase "before this code takes effect" can be transmogrified into an open-ended reference to all future dates in which any repeal or amendment to any part of the Business and Professions Code might take effect.

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[17] Plainly, the word "code" in section 4 cannot be interpreted out of the phrase and specific context in which it actually appears, as Plaintiff effectively seeks to do here. (*State Farm Mut. Auto Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 (*State Farm*) ["'statutory language'" must be construed "'in context'" and not "'in isolation,'" citation omitted]; *Quintano v. Mercury Cas. Co.* (1995) 11 Cal.4th 1049, 1055 ["words of [a] statute must be construed in context," giving meaning "to every word" and "phrase" employed].)

Plaintiff cites no authority that holds – or even suggests – that sections 4 and 12, separately or together, qualify as any "general saving clause" sufficient to abrogate the Repeal Rule. The only "authority" Plaintiff cites for its position is inapposite dicta in *Koster v. Warren* (9th Cir. 1961) 297 F.2d 418, 419-420 – a case not even implicating the Repeal Rule – suggesting that Corporations Code sections 4 and 9 "cast doubt" on whether Corporations Code section 834's liberalization of a plaintiff's ability to sue without posting a bond could be applied retroactively to a defendant's detriment. That dicta is plainly insufficient to transform sections 4 and 12 into any *general saving clause* that, under *McNulty* and *Peterson*, precludes application of Proposition 64's repeal of the statutory authority for Plaintiff's UCL claim to this case under the Repeal Rule.

But even assuming arguendo that the language of sections 4 and 12 is ambiguous and might be read in the expansive manner Plaintiff requests, the Court must reject any such broad constructions pursuant to the "well settled" canon that statutes "in derogation" of "common law" principles "must be construed strictly." (*Prager v. Isreal* (1940) 15 Cal.2d 89, 93; accord, *Bozanich v. Kenney* (1970) 3 Cal.3d 567, 570; see also *United States v. Texas* (1993) 507 U.S. 529, 534 ["to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law"].)[18] Because any purported saving clause constitutes a statute in derogation of the common law's Repeal Rule, such provisions are strictly construed and limited. (See, e.g., *Bell v. Maryland* (1964) 378 U.S. 226, 233-234; *Rodgers v. United States* (6th Cir.) 158 F.2d 835, 836-837, *rev'd on other grounds* (1947) 332 U.S. 371; cf. *Rossi, supra*, 18 Cal.3d at pp. 299-304 [reaffirming conclusion and analysis from *In re Estrada* (1965)

[18] Although some codes have provisions abrogating this canon as applied to those specific codes (e.g., Civ. Code, § 4; Penal Code, § 4; Code Civ. Proc., § 4), the Business and Professions Code contains no such provision.

63 Cal.2d 740, 748, that language in California's general criminal saving clause, Gov. Code, § 9608, is accorded "limited scope" and does not entirely "abrogate the well-established common law rule" relating to repeals in criminal context].) Under this applicable canon, "[w]here there is any doubt about their meaning and intent," statutes in derogation of the common law "are given the effect which makes the least rather than the most change in the common law." (3 N.J. Singer, Statutes & Statutory Construction (6th ed. 2001) § 61:1, at p. 217.)

II. Proposition 64 Alternatively Applies To Pending Cases Because Such Application Is Prospective, And Because Its Provisions Do Not Change The Legal Consequences Of Past Completed Conduct In Any Legally Cognizable Way

While Proposition 64 applies to pending cases under the Repeal Rule, there are at least two reasons why Proposition 64 alternatively applies here under this Court's distinct jurisprudence governing the "prospective" and "retroactive" application of new statutory enactments. (*Tapia, supra*, 53 Cal.3d at pp. 288-291; accord, *Elsner, supra*, 34 Cal.4th at pp. 936-937; *Aetna Cas. & Surety Co. v. I.A.C.* (1947) 30 Cal.2d 388, 394-395 (*Aetna*).) Under those rules, a "statute is applied retroactively only if it changes the legal consequences of an act completed before the effective date of the statute," while a statute "addressing procedures to be utilized in legal proceedings not yet concluded operates prospectively for acts to be performed after the effective date of the statute." (*Florence Western Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, 503.)

A. Proposition 64 Applies Here On A Prospective Basis In Accordance With The Plain Meaning Of The UCL's Amended Statutory Text

Analysis of the proper application of any new statutory provision "must begin" with the "plain language of the statute"; if the "statute's

language is clear" then its "plain meaning" governs. (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 8; accord, AB at 15.) The same rule applies "equally in construing statutes enacted through the initiative process." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) Thus, the Court begins by examining the language of the UCL's amended statutory text, "giving the words their usual and ordinary meaning." (*Ibid.*)

Importantly, the Court analyzes the "date of the conduct regulated" (*Tapia, supra*, 53 Cal.3d at p. 291) by the "language of the statute" (*Kizer, supra*, 48 Cal.3d at pp. 7-8) in determining whether the enactment's application is prospective or retrospective. (See *John L. v. Superior Court* (2004) 33 Cal.4th 158, 168-171 (*John L.*) [analyzing conduct governed by plain language of statute amended by Proposition 21 in finding application "prospective" under *Tapia*]; *Tapia, supra*, 53 Cal.3d at p. 291 [explaining *Hayes, supra*, 49 Cal.3d at pp. 1273-1274, where "conduct regulated" by new enactment was the procuring of pre-hypnotic evidence without satisfying certain conditions, so exclusion of past evidence collected before new enactment took effect would be "retroactive"].)

The plain language of the UCL's amended statutory text confirms that application of Proposition 64 to prevent this uninjured Plaintiff from continuing to prosecute any UCL claim after its effective date is prospective in nature. Section 17204, as amended, restricts the standing of private plaintiffs by mandating that UCL claims "shall be *prosecuted* exclusively" by those who "suffered injury in fact" and "lost money or property as a result of" the alleged UCL violations. (Prop. 64, § 3, italics added.)[19] The plain meaning of the word "prosecute" includes any effort to

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[19] The court in *Consumer Advocacy* erred in making much of the fact that the words "shall be prosecuted exclusively ... by" were in section 17204 before and not added by Proposition 64. (129 Cal.App.4th at p. 572.) Plainly what matters is that the voters in Proposition 64 *retained* that

litigate a case to completion: "To 'prosecute' an action is not merely to commence it, but includes following it to its ultimate conclusion." (Black's Law Dict. (6th ed. 1990) p. 1221; Webster's 3d New Internat. Dict. Unabridged (2002) p. 1820 [defining "prosecute" as: "to follow to the end," "press to execution or completion," "pursue until finished," and "to institute and carry on a legal suit"]; *Melancon v. Superior Court* (1954) 42 Cal.2d 698, 707-708 [reaffirming that term "prosecution" is "'sufficiently comprehensive to include every step in an action from its commencement to its final determination,'" citation omitted]; accord, *Ramos v. Superior Court* (1982) 32 Cal.3d 26, 36.)[20]

Plaintiff and the Court of Appeal misinterpret Proposition 64 to establish only a "'new rule concerning *the filing of complaints,*'" which "'would not govern an action in which the complaint had already been properly filed under the old regime.'" (Slip Op., at p. 9, italics added, quoting *Landgraf, supra*, 511 U.S. at p. 275, fn. 29; accord, AB at 6-7.) The *conduct regulated* by the plain language of the UCL's amended standing provision is any effort to *prosecute* a UCL action: Section 17204

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language; the words added by Proposition 64 must be construed in the context of the other words and phrases in section 17204. (*State Farm, supra*, 32 Cal.4th at p. 1043; see also *Newton v. Kuchel* (1950) 35 Cal.2d 830, 834 [construing added words in context of words and phrases "retained by the amendment"].)

[20] Further, Proposition 64 amends section 17203 to provide that private parties may "pursue" UCL actions in any representative capacity only if they satisfy the UCL's standing requirements and comply with the class-action requirements of Code of Civil Procedure section 382. (Prop. 64, § 2.) Like the statutory term *prosecute*, the plain meaning of the term "pursue" encompasses the full litigation of an action. (Black's Law Dict., at p. 1237 [defining "pursue" as "[t]o follow, prosecute, or enforce a matter judicially, as a complaining party"].) Thus, the same prospectivity analysis applicable to Proposition 64's amendment to section 17204's standing provision applies to its representative-litigation/class-action amendment to section 17203.

as amended mandates that UCL actions shall not be "prosecuted" by uninjured private parties. (Prop. 64, § 3.) Thus, applying Proposition 64 *today* to hold that this uninjured Plaintiff no longer has standing to prosecute any UCL claim for the general public is a "prospective" application of section 17204, as amended, to proceedings occurring *after* Proposition 64's November 3, 2004 effective date. (*Tapia*, *supra*, 53 Cal.3d at pp. 288-290 [new enactments governing "the procedure to be followed in the future" apply to pending cases on a "prospective" basis and are "'not made retroactive merely because [they] draw[] upon facts existing prior to [their] enactment,'" citation omitted]; accord, *Elsner*, *supra*, 34 Cal.4th at p. 936.)

Plaintiff is wrong to argue that applying Proposition 64 today would be retroactive because it "would have the effect of reaching back in time to eliminate" Plaintiff's UCL representative action. (AB at 44.) The relevant conduct at issue is *not* Plaintiff's past conduct, but its conduct today – after Proposition 64's effective date. Plaintiff continues to "invoke[]" section 17204's standing provision as authorizing Plaintiff to prosecute a UCL claim in proceedings that "postdate[] the enactment" of Proposition 64 (*Aetna*, *supra*, 30 Cal.2d at p. 394), but the voters have withdrawn that authorization effective November 3, 2004. UCL claims "prosecuted" (Prop. 64, § 3) while Proposition 64 is in effect are necessarily subject to its terms – regardless of when the defendant's alleged violation occurred or when the complaint was filed. (See *John L.*, *supra*, 33 Cal.4th at pp. 169-171.)

Plaintiff would have the Court construe the amended text of section 17204 narrowly to provide that UCL actions shall be "filed" or "brought" by actually injured parties – imposing a requirement that must be satisfied *only* upon the *filing* or *bringing* of a UCL complaint. But the words "file"

and "bring" (or any derivations thereof) do *not* appear in the UCL's statutory text, as revised by Proposition 64. Thus, Plaintiff is effectively asking the Court to *rewrite* section 17204's statutory language as if it contained those narrower terms when, in fact, the amended section 17204 mandates that UCL actions "shall be *prosecuted* exclusively ... by" a list of persons of whom Plaintiff is not a member. (Prop. 64, § 3, italics added; see *John L., supra*, 33 Cal.4th at p. 169 [rejecting retroactivity argument regarding Proposition 21 where Court "would have to rewrite the statute in order to restrict its scope in this manner"]; *In re Hoddinott* (1996) 12 Cal.4th 992, 1002 [rejecting argument that "ignores the plain language of the statute"; courts "may not rewrite the statute to conform to an assumed intention which does not appear from its language," internal quotations and citation omitted].)

But even if application of Proposition 64 here were considered "retroactive," the plain language of the UCL's statutory text as amended provides a "clear indication that the electorate" intended it to apply to pending cases. (*Tapia, supra*, 53 Cal.3d at p. 287.) This is consistent with the voters' "intent" to authorize "*only* the California Attorney General and local public officials" not only "to file" but also to "prosecute" any UCL action "on behalf of the general public." (Prop. 64, § 1(f), italics added.)[21] Given the ballot arguments that Proposition 64 was designed to "close the loophole" in the UCL's standing provision that allowed the *uninjured* to prosecute UCL claims in order "to stop" such suits (*Ante*, at p. 5 & fn. 2), it would be "'absurd' to 'subscribe to the notion that the [voters] desired to

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[21] Indeed, to accept Plaintiff's arguments, the Court must countenance the absurd notion that the voters intended to permit those like the Trevor Law Group to *continue* to prosecute the very abusive, frivolous UCL lawsuits for uninjured plaintiffs that influenced Proposition 64's overwhelming enactment.

postpone the demise of a procedural loophole.'" (*Tapia, supra*, 53 Cal.3d at p. 289, quoting *Andrus v. Superior Court* (1983) 143 Cal.App.3d 1041, 1047.)

B. Plaintiff Has Failed To Demonstrate That Applying Proposition 64 To This Pending Case Would Have Any "Retroactive" Effect

Plaintiff concedes that, under *Tapia, supra*, 53 Cal.3d at pp. 288-291, and *Elsner, supra*, 34 Cal.4th at pp. 936, new procedural enactments may apply to future proceedings in pending cases on a prospective basis without raising retroactivity concerns (AB at 43-44), but argues that applying Proposition 64 here would have a "retroactive" effect and deprive Plaintiff of substantive "rights" it supposedly had under the pre-Proposition 64 UCL regime. (AB at 44-53.) Plaintiff's arguments are unavailing.

First, while it may not be dispositive whether the labels "procedural" or "substantive" best describe Proposition 64's *standing* and *representative-litigation/class-action* amendments to the UCL's procedural provisions in sections 17204 and 17203 (see *Elsner, supra*, 34 Cal.4th at pp. 936-937), this Court and others have repeatedly acknowledged the *procedural* nature of both standing and representative-litigation/class-action requirements. Plaintiff's claim that any "standing" matter is *substantive* because "it affects the right of a party to sue" (AB at 44) is contrary to numerous decisions acknowledging the "procedural" nature of threshold "standing" requirements. (See *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 348; *Van Atta v. Scott* (1980) 27 Cal.3d 424, 447; *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1523; see also *Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1164 fn. 2; *Residents of Beverly Glen, Inc. v. Los*

Angeles (1973) 34 Cal.App.3d 117, 122.)[22] Likewise, Plaintiff's effort to characterize all class-action requirements as substantive (AB at 49-51) is contrary to countless cases recognizing the "procedural" nature of class-action requirements (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440; *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1106; see also *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326; *Green v. Obledo* (1981) 29 Cal.3d 126, 146; *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 849; *Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 716), as well as the propriety of any form of representative litigation (*Grant v. McAuliffe* (1953) 41 Cal.2d 859, 864; *Weaver v. Pasadena Tournament of Roses Ass'n* (1948) 32 Cal.2d 833, 841).[23]

That Proposition 64 does not change the UCL's substantive proscriptions (section 17200), but rather only its procedural provisions (17204 and 17203), should inform the Court's retroactivity analysis.[24]

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[22] The one sentence from Witkin's treatise on which Plaintiff relies (AB at 44, fn. 12) neither states or implies that this *uninjured* Plaintiff is the real party in interest with any cognizable *substantive rights* in the UCL claim it asserts for the general public.

[23] In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 161 – cited by Plaintiff (AB at 49) – this Court stated that class actions can be important to the vindication of substantive rights while assessing whether an *adhesive* class-action/arbitration *waiver* in consumer contracts was "unconscionable" (and hence unenforceable) in California. Plainly, *Discover Bank* does not provide that all class-action rules are substantive and involve substantive rights. More importantly, *Discover Bank* does not hold or otherwise provide that an *uninjured* party has any *substantive* right to pursue a *non-class* "representative" action, or that the nature of such non-class representative actions prevents intervening changes in the procedures governing representative litigation from applying to pending cases under this Court's *retroactivity-prospectivity* cases.

[24] Notably, if the Court somehow were to accept Plaintiff's incorrect arguments regarding Business and Professions Code sections 4 and 12

Applying such procedural changes to govern future proceedings raises retroactivity concerns only if it is shown to be *substantive in effect* by actually "chang[ing] the legal consequences of past conduct." (*Tapia*, *supra*, 53 Cal.3d at pp. 288-291; *Aetna*, *supra*, 30 Cal.2d at pp. 394-395 [new enactment is "substantive" in effect where "it imposes a new or additional liability and substantially affects existing rights"].) Indeed, this Court has repeatedly emphasized that a new enactment is deemed "retroactive" where it "'substantially changes the legal consequences of past events'" that were "'completed before its enactment.'" (*McClung*, *supra*, 34 Cal.4th at p. 472 (quoting *Western Security Bank v. Superior Court* (*Vista Place Assocs.*) (1997) 15 Cal.4th 232, 243, and *Landgraf*, *supra*, 511 U.S. at p. 270); accord, *John L.*, *supra*, 33 Cal.4th at p. 172; *Tapia*, *supra*, 53 Cal.3d at pp. 288-291; *Kizer*, *supra*, 48 Cal.3d at p. 7.)

Plaintiff fails to demonstrate that applying Proposition 64 would actually change the legal consequences of any past conduct completed before November 3, 2004 – for it would not. Any defendant's conduct violating the UCL before violates the UCL after Proposition 64; and any defendant that violated the UCL *remains subject to suit* by public authorities and those actually injured by such violations. Proposition 64 operates after its effective date to prevent the *uninjured* from continuing to prosecute UCL claims – including the procedural ability to pursue UCL claims in any representative capacity for others. Thus, Proposition 64 does not eliminate Mervyn's exposure to injured parties or extinguish all possible UCL claims against Mervyn's; but rather merely eliminates this

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(*Ante*, at pp. 27-34), then the *procedural* nature of Proposition 64's standing and class-action provisions would support their application to pending cases – because section 4's last clause provides "but *all procedure* thereafter taken therein *shall* conform to the provisions of this code *so far as possible*." (Bus. & Prof. Code, § 4, italics added.)

uninjured Plaintiff's ability to prosecute any UCL claim for the general public against Mervyn's.[25]

None of Plaintiff's cases supports its retroactivity arguments. They involve inapposite circumstances where applying a new enactment would either (1) change the legal consequences of the *defendant's* past conduct, by "impos[ing] a new or additional liability" on defendant and thereby "substantially affect existing rights and obligations" (*Aetna*, *supra*, 30 Cal.2d at pp. 391-392, 394-395 [new amendment held "substantive in its effect" because it "increased the amount of compensation above what was payable at the date of the injury"]; *Tapia*, *supra*, 53 Cal.3d at pp. 297-301 [new provisions that "change the legal consequences of criminal behavior to the detriment of defendants" cannot be applied to defendant's past conduct]; *Hughes Aircraft Co. v. United States ex rel. Schumer* (1997) 520 U.S. 939, 948 [holding that amendment *expanding* standing to sue could not be applied to defendant's pre-enactment conduct because that would "eliminate[] a defense" and impose a new disability on defendant based on its past conduct]; see also *Ante*, at pp. 21-23, distinguishing *Elsner*, *Myers* and *McClung* on this basis[26]]; or (2) change the legal consequences of plaintiffs' and defendants' past conduct in connection with common law claims, where the parties had taken irreversible actions in reasonable reliance on the then-existing state of the common law rules subsequently

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[25] Plaintiff's suggestion that applying Proposition 64 must have a substantive retroactive effect because it would result in "termination" and "dismissal" of the case (AB at 45, 52) is erroneous; new procedural rules apply on a prospective basis to future proceedings even where that might result in the case's "'dismissal.'" (*Tapia*, *supra*, 53 Cal.3d at p. 289, discussing *Republic Corp. v. Superior Court* (1984) 160 Cal.App.3d 1253, 1257-1258.)

[26] As Mervyn's notes, this Court's decisions in *Hayes* and *Cole* (also cited by Plaintiff, AB at 46) are entirely inapposite here.

modified by Proposition 51 (*Evangelatos*, *supra*, 44 Cal.3d at pp. 1225-1226 & fn 26; see also *Ante*, at pp. 23-25 [distinguishing *Evangelatos* and explaining why Plaintiff's claimed "reliance" on UCL's standing provision repealed by Proposition 64 was *not* legally justifiable and reasonable under California law].)

Nothing in Plaintiff's cited cases supports the assumption that an amendment *withdrawing* (rather than expanding) a statutory standing provision would have any retroactive substantive effect – particularly where, as here, the new enactment *deprives uninjured* parties of *representative* standing to prosecute purely statutory and entirely *equitable* claims for the general public, while it *preserves* the rights of injured persons (and public authorities) to prosecute alleged wrongdoers. Indeed, Proposition 64 does not impose any "new or additional liability" on Defendant or Plaintiff; nor does it otherwise change the legal consequences of completed past conduct in any legally cognizable way.

The suggestion that applying Proposition 64 to "terminate" this lawsuit would deprive Plaintiff of some substantive "right" it claims to have had under the pre-amended UCL regime (AB at 45-46) is unfounded. Parties in California have *no* legally protected "rights" in any purely statutory claims that are not at risk of being impaired by an intervening enactment at any time prior to non-appealable final judgment. (See *Ante*, at pp. 8-13, 18-19.)[27] In fact, because Plaintiff was admittedly *not injured* by

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[27] For its "rights" argument, Plaintiff apparently relies on an expansive interpretation of one formulation of the retroactivity test: whether the new enactment "'affects rights, obligations, acts, transactions and conditions which [we]re performed or exist[ed] prior to the adoption of the statute.'" (*Tapia*, *supra*, 53 Cal.3d at p. 291, citation omitted; AB at 45-46, 49.) As *Tapia* explains, the Court has not employed that formulation to prevent application of new procedural enactments to the conduct of future trials and proceedings. (53 Cal.3d at pp. 291-292.) The same formulation appears in

Defendant's alleged UCL violations, it is inconceivable to posit that Plaintiff has any *substantive* "rights" at all – particularly where the claimed "right" at issue is the *procedural* ability of *uninjured* parties to prosecute statutory equitable claims in a *representative* capacity for others. (See *Hogan v. Ingold* (1952) 38 Cal.2d 802, 812-813.) Moreover, Plaintiff purports to prosecute a UCL claim for the "general public," but it was the general public – the voters – that enacted Proposition 64 to deprive uninjured persons of the authority to prosecute UCL claims for them and to authorize only public officials to do so. (Prop. 64, § 3; *id.*, §§ 1(f), 1(g).)

Finally, the suggestion that Proposition 64 deprives Plaintiff of some inviolate "right" it had before Proposition 64 (AB at 47-48, 51-53) is particularly meritless here, because a UCL plaintiff who suffered no injury has no "right" to relief. A "UCL action is one in equity." (*Kraus*, *supra*, 23 Cal.4th at p. 138.) Before Proposition 64, courts always had – and still have – broad discretion to "decline to entertain the action as a representative suit" for equitable reasons (*ibid.*); to abstain where appropriate (e.g., *Desert Healthcare Dist. v. Pacificare, FHP, Inc.* (2001) 94 Cal.App.4th 781,794-795); and to deny any "equitable" relief *even* where "an unfair business practice has been shown," because the UCL does "not mandate restitutionary or injunctive relief" (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 180).

In sum, depriving an uninjured party of continued admission into a court of equity on a purely statutory claim asserted only in a representative

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Aetna and *Evangelatos*, but the holdings in both cases were based on the critical conclusion that the new statutes "changed the legal consequences of past conduct by imposing new or different liabilities based upon such conduct." (*Id.*, at pp. 290-291.) *Myers* also equates that formulation with this standard: "Phrased another way, a statute that operates to 'increase a party's liability for past conduct' is retroactive." (28 Cal.4th at p. 839, citation omitted.)

capacity does not change the legal consequences of past conduct in any legally cognizable way. Indeed, because Proposition 64 *preserves* the ability of both public prosecutors and actually injured persons to prosecute UCL violators, the initiative does not itself change the legal consequences of past conduct at all.

CONCLUSION

For the foregoing reasons, the Court should hold that Proposition 64 applies to cases pending before it was enacted and went into effect.

DATED: September 15, 2005

Respectfully submitted,

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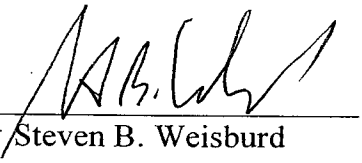
RULE 14(c)(1) CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies, pursuant to Rule 14(c)(1) of the California Rules of Court, that the AMICUS CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE, THE CALIFORNIA BANKERS ASSOCIATION, THE CALIFORNIA FINANCIAL SERVICES ASSOCIATION, THE CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION, AND THE CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, ON PROPOSITION 64'S APPLICATION TO PENDING CASES, IN SUPPORT OF DEFENDANT AND APPELLANT MERVYN'S LLC is produced using proportionately-spaced Times New Roman 13-point typeface and that the text of this brief (including footnotes) contains 13,996 words according to the word count provided by the computer program used to prepare this brief.

Dated: September 15, 2005

By: 
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PROOF OF SERVICE VIA U.S. MAIL

I am employed in the City and 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 560 Mission Street, 27th Floor, San Francisco, California 94105.

On September 15, 2005, I served the foregoing document described as follows: **AMICUS CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE, THE CALIFORNIA BANKERS ASSOCIATION, THE CALIFORNIA FINANCIAL SERVICES ASSOCIATION, THE CALIFORNIA MANUFACTURERS & TECHNOLOGY ASSOCIATION, AND THE CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, ON PROPOSITION 64's APPLICATION TO PENDING CASES, IN SUPPORT OF DEFENDANT AND RESPONDENT MERVYN'S LLC** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

**** SEE ATTACHED SERVICE LIST ****

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 15, 2005, at San Francisco, California.

Julie W. Lunsford

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