No. S131798

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CALIFORNIANS FOR DISABILITY RIGHTS,
Plaintiff and Appellant,

v.

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

PETITION FOR REHEARING OR MODIFICATION OF OPINION

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Unfair Competition Case
Service on the California Attorney General and the District Attorney Required by Bus. & Prof. Code § 17209 and Cal. Rules of Court, rules 15(c)(3), 44.5(c)

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I. INTRODUCTION

Plaintiff and Appellant Californians for Disability Rights ("CDR") hereby petitions the Court for modification of the decision or in the alternative for rehearing on the grounds that clarification is required as to how this action will proceed in the Court of Appeal. Specifically, in the companion case of *Branick v. Downey Savings and Loan Assn.* (July 24, 2006, S132433) __ Cal.4th __ ("*Branick* Slip op."), this Court decided that plaintiffs who do not meet the new standing provisions of the Unfair Competition Law, Business and Professions Code section 17200 *et seq.* ("UCL"), may seek leave to substitute a new plaintiff who does enjoy standing. This holding plainly applies to all affected cases that were filed prior to November 3, 2004, the date the new standing provisions took effect, but were not final as of that date. The Court in this case remanded the case to the Court of Appeal for further proceedings, however, without reference to *Branick*. Moreover, the procedural posture in *Branick* required remand to the Superior Court to address the leave to amend issue. Here, CDR should be permitted to move in the Court of Appeal, before which the appeal of judgment after a full trial on the merits remains pending, for leave to substitute a plaintiff who enjoys standing under the UCL. (See Cal. Rules of Court, rules 29.4(c), 24(c).)

Modifying the opinion in this case is necessary to conserve the courts' and the parties resources, to avoid extensive motion practice in the lower courts on the proper procedure to be followed, and to encourage the efficient resolution of this action and of other actions in a similar procedural posture. Accordingly, the Court should clarify its opinion to provide guidance to the parties and the lower courts.

II. RELEVANT BACKGROUND

CDR brought this action in 2002 against Mervyn's LLC ("Mervyn's") as a private attorney general under the Unfair Competition Law, Business and Professions Code section 17200 et seq. to redress Mervyn's failure to provide full and equal access to its merchandise to customers with mobility disabilities, in violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) and the Disabled Persons Act (Civ. Code, § 54 et seq.).

In its Statement of Decision issued after trial, the trial court made three key findings of discrimination: (1) that Mervyn's has no minimum spacing requirements for the pathways between moveable display racks; (2) that Mervyn's does not measure the pathways or know how wide they are; and (3) that Mervyn's has a discriminatory policy or practice of maintaining narrow pathways that prevent or impede access for persons with mobility disabilities to the merchandise at its stores. (AA 543, 553, 571.) Rather

than order appropriate injunctive relief, however, the trial court erroneously allowed Mervyn's to take advantage of the "readily achievable" and "fundamental alteration" affirmative defenses available under the federal Americans With Disabilities Act (42 U.S.C. § 12182 et seq. (the "ADA")) but not afforded under state law, and then misconstrued and misapplied those defenses. Based solely on its erroneous conclusions about these federal defenses, the court entered judgment for Mervyn's.

On December 6, 2004, after CDR timely appealed and filed its opening brief on the merits, Mervyn's moved to dismiss the appeal based on the passage of Proposition 64, which amended portions of the UCL and became effective on November 3, 2004. On February 1, 2005, after briefing by the parties and *amici* and oral argument, the Court of Appeal denied Mervyn's motion in a published decision. (*Californians for Disability Rights v. Mervyn's LLC* (2005) 24 Cal.Rptr.3d 301.) On July 24, 2006, this Court reversed and remanded to the Court of Appeal for further proceedings consistent with its opinion.

III. ARGUMENT

A. Under *Branick*, CDR is Entitled to Seek Substitution of a Plaintiff with Standing.

In *Branick*, this Court held that plaintiffs who no longer enjoy standing under the UCL are entitled to seek substitution of plaintiffs who do

meet the new standing requirements. In so holding, the Court "reject[ed] defendant's contention that courts may never permit a plaintiff to amend a complaint to satisfy Proposition 64's standing requirements." (*Branick* Slip op. at 2.) The Court reasoned that while Proposition 64 applies to pending cases, "[a]n additional rule barring amendments *to comply* with Proposition 64 does not rationally further any goal the voters articulated." (*Id.* at 5, emphasis in original.)

The former version of the UCL expressly conferred standing to sue upon CDR. Because CDR is a non-profit organization and may no longer have standing under the UCL, CDR now must be permitted, under *Branick*, to seek leave to substitute plaintiffs with standing.[1] Accordingly, this Court should clarify its opinion to state that CDR is entitled to the same right to

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[1] In fact, CDR so requested in its Answering Brief on the Merits. As that Brief stated:

> If this Court nevertheless concludes that Proposition 64 applies to this case, leave to amend to substitute a suitable plaintiff should be allowed. Such an amendment would not prejudice Mervyn's because it would not substantially change this action by introducing new facts or legal theories. (See *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 20-21.) A trial on the merits has already been completed. Several individuals who directly encountered barriers to access in Mervyn's stores testified at trial. They could substitute into the action and continue to prosecute this appeal.

(CDR Answering Brief at 58-59, fn. 14.)

substitution as the plaintiffs in *Branick*.

B. The Court of Appeal in This Case Has the Authority to Consider a Motion for Substitution of Plaintiff.

In *Branick,* this Court found that a motion for leave to amend should be filed in the trial court. The procedural posture of this case, however, requires that the Court of Appeal consider a motion for substitution in the first instance and render a decision on the merits before sending the case back to the trial court.

The procedural status of the case in *Branick* differs considerably from the case here. There, the Court of Appeal had already determined the merits of the appeal and had remanded it to the trial court on the merits and on the issue of leave to amend before this Court granted review. In *Branick*, defendant moved for judgment on the pleadings, asserting that plaintiffs' UCL and other state law claims were preempted by federal law. The trial court granted the motion and entered judgment for the defendant. Plaintiffs appealed. After the merits briefing had been completed, Proposition 64 was passed. The Court of Appeal considered supplemental briefing on the effect of Proposition 64. It then reversed the decision of the trial court, finding that plaintiffs' claims were not preempted. It also found that Proposition 64 applied to the case, but remanded to the trial court for a determination of whether leave to amend should be granted. (See *Branick*

Slip op. at 3.)

This Court in *Branick* affirmed the Court of Appeal's determination regarding Proposition 64. The Court also found, as the Court of Appeal had, that a motion for leave to amend must be entrusted to the discretion of the trial court because the identity of any person plaintiffs might attempt to substitute and the nature of the claims any substituted person might assert was not yet before the court. (*Branick* Slip op. at 6-7.) This Court thus affirmed the Court of Appeal's decision, which had already determined the merits of the appeal and reversed and remanded to the trial court on those grounds. (*Id.* at 3, 10.)

In this case, however, the parties are still awaiting a determination on the merits of an appeal after a full trial in the superior court. The merits briefing on appeal was interrupted by the passage of Proposition 64, which led Mervyn's to file a motion to dismiss the appeal. Because jurisdiction is still properly before the Court of Appeal, and because the court has the authority to rule on a motion for substitution of parties, the motion is properly brought before the Court of Appeal. (See Cal. Rules of Court, rule 48(a) ("Substitution of parties in an appeal or original proceeding must be made by serving and filing a motion in the reviewing court."); *Hollaway v. Scripps Memorial Hospital* (1980) 111 Cal.App.3d 719, 723-25

(contested removal of guardian ad litem during pendency of appeal); *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 313, fn. 2 (Court of Appeal ordered substitution of personal representative after having been advised in appellate brief that respondent had died).)

The trial court's final statement of decision, as well as the trial transcripts, all of which is before the Court of Appeal, contain the testimony of 18 witnesses with mobility disabilities who experienced discrimination by Mervyn's. Among these 18 witnesses are individuals who are willing and capable to substitute into this action as plaintiffs. The testimony of these witnesses demonstrates that they meet the new standing provisions of Proposition 64 and should be allowed to continue prosecuting this action in the Court of Appeal. The information necessary to make a determination as to leave to substitute a plaintiff is already before the Court of Appeal – it is therefore in the same position as the trial court. Such was clearly not the case in *Branick.*

Accordingly, this Court should clarify its opinion to state that CDR may seek substitution of the plaintiff in the Court of Appeal. Alternatively, if the Court determines that the Court of Appeal lacks the authority to grant leave to substitute plaintiff, then the Court should clarify that the Court of Appeal may remand to the trial court for the limited purpose of determining

leave to substitute plaintiff, after which the Court of Appeal will then rule on the merits of the appeal.

IV. CONCLUSION

For the foregoing reasons, CDR respectfully requests modification and clarification of the opinion in Mervyn's to state that CDR is entitled to seek substitution of plaintiff in the Court of Appeal.

Dated: August 8, 2006

Respectfully submitted,

THE STURDEVANT LAW FIRM
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1) of the California Rules of Court, Plaintiff and Appellant Californians for Disability Rights hereby certifies that the typeface in the attached brief is proportionally spaced, the type style is roman, the type size is 13 points or more and the word count for the portions subject to the restrictions of Rule 14(c)(3) is 1,646.

Dated: August 8, 2006

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 475 Sansome Street, Suite 1750, San Francisco, California 94111.

On August 8, 2006, I caused the document entitled below to be served on the parties in this action listed below by placing true and correct copies thereof in sealed envelopes and causing them to be served, as stated:

PETITION FOR REHEARING OR MODIFICATION OF OPINION

By U.S. Mail:

I am also readily familiar with The Sturdevant Law Firm's practice for collection and processing of documents for ***mailing*** with the ***United States Postal Service***, being that the documents are deposited with the United States Postal Service with postage thereon fully prepaid the same day as the day of collection in the ordinary course of business.

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