No. S_____

IN THE
SUPREME COURT OF CALIFORNIA

ADAM A. SCHWARTZ,

Plaintiff/Petitioner,

vs.

VISA INTERNATIONAL SERVICE ASSOCIATION, VISA U.S.A. INC., AND MASTERCARD INTERNATIONAL INCORPORATED,

Defendants/Respondents.

California Court of Appeal,
First Appellate District, Division Two, No. A105222

Superior Court of the State of California
County of Alameda
The Honorable Ronald M. Sabraw
Superior Court No. 822404-4

PETITION FOR REVIEW

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I. ISSUE PRESENTED FOR REVIEW

The issue presented is familiar in light of this Court's grant of review of a similar issue in numerous recent cases: Did the Court of Appeal err in concluding that the voters intended Proposition 64 to be applied retroactively to actions filed before the initiative became law – even actions like this one in which judgment was awarded to plaintiff and valuable relief was granted to millions of consumers?

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This Court will grant review where there is a demonstrated need "to secure uniformity of decision" or "to settle an important question of law." (Cal. Rules of Court, rule 28(b)(1).) By these standards, the Court of Appeal's published decision holding Proposition 64 applicable to this case indisputably warrants review by this Court. Indeed, the Court already has granted review of numerous other Proposition 64 decisions, most notably the rulings in *Californians for Disability Rights v. Mervyn's, LLC*, No. S131798 (*Mervyn's*), and *Branick v. Downey Savings Bank*, No. S132433 (*Branick*). In these cases, the Court requested briefing on the issue of Proposition 64's retroactivity, as well as the question whether amendment should be permitted in such cases. Since then, it has accepted "grant and hold" review of virtually every other published decision addressing these issues, even granting such review sua sponte where it was not specifically sought.[1] The present case is a particularly compelling one for review, given the trial court's finding of intentional wrongdoing on defendants' part and the judgment awarding 100% restitution to consumers.

The Court's interest in these issues is not surprising. There has been a significant split of opinion in the intermediate appellate courts regarding Proposition 64's application to pre-existing "private attorney general" cases brought pursuant to California's unfair competition laws, Business & Professions Code sections 17200 and 17500 et seq. (UCL). Litigations have

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[1] This Court has accepted "grant and hold" review in at least the following cases: *Benson v. Kwikset Corp.*, No. S132443; *Bivens v. Corel Corp.*, No. S132695; *Lytwyn v. Fry's Electronics, Inc.*, No. S133075 [review granted after request for depublication filed]; *Thornton v. Career Training Center*, No. S133938; *Schultz v. Neovi Data Corp.*, No. S134073; *Cohen v. Health Net of California*, No. S135104; and *Consumer Advocates Group, Inc. v. Kintetsu Enterprises*, No. S135587.

been put on hold pending resolution of the *Mervyn's* and *Branick* cases. Resolution of these questions will provide urgently needed uniformity and guidance to the lower courts.

Even more significantly, Proposition 64, if applied retroactively, could have profound implications for cases filed before its enactment and the parties litigating them. Like the present case, which was commenced six years ago, many of these actions have been pending for years. The plaintiffs and their counsel have invested substantial resources and effort pursuing their claims. The fruits of those labors could simply disappear if Proposition 64 were held to be retroactive. "Private attorney general" cases in which no plaintiff meeting the new standing requirements is available could be terminated for reasons having nothing to do with the merits, and the defendants in those cases, regardless of how egregious their wrongful conduct, could receive a windfall. Even if this Court concludes that leave to amend is appropriate, on remand to the trial courts the parties would face the prospect of, among other things, litigating entirely new issues currently being pursued by many UCL defendants, including the purported need for class certification and whether Proposition 64 altered the substantive elements of UCL liability.

The havoc that retroactive application of Proposition 64 potentially could wreak upon meritorious UCL cases is powerfully illustrated by this case. After several years of hard-fought litigation and a bench trial conducted over a period of six months, the trial court issued its decision finding defendants Visa and MasterCard liable for their "intentional concealment" of the 1% foreign transaction fee. (1 RSA 109.)[2] In a 125-page opinion containing 218 findings of fact, the court explained in detail the overwhelming evidence supporting its conclusions. It then carefully crafted both injunctive and restitutionary relief

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[2] References are to the appendices filed in the Court of Appeal.

tailored to the facts of the case. The restitution awarded has made available hundreds of millions of dollars to affected cardholders. Significantly, the injunction will benefit not only millions of existing MasterCard and Visa cardholders, but future cardholders as well.

Giving effect to a law's intent is the bedrock principle of statutory construction. (See *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587.) This elemental principle, together with notions of fundamental fairness, informs another basic rule of statutory interpretation: New laws generally will be deemed to operate prospectively only unless a clear, contrary intent is shown. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207 (*Evangelatos*).) The intent analysis ought to be particularly meticulous with respect to voter propositions. The language of such measures is controlled completely by the drafters. The voters' understanding of what they are voting upon is derived almost exclusively from scant ballot statements and 30-second partisan sound bites. The initiative process, therefore, frequently fails to provide a meaningful opportunity for voters to fully comprehend the meaning and import of the measures at issue.

If ever a case exemplified why courts must demand a showing of clear, unequivocal retroactive intent before applying new laws to existing matters, this is that case. At risk here is a plaintiff's judgment arising from ***intentional*** UCL violations by defendants, and resulting in the award of valuable relief to MasterCard and Visa cardholders that will benefit the general public as well. That judgment cannot and should not be disturbed absent definitive evidence that the voters intended such a result.

Try as they might, UCL defendants have never made any showing of a manifest intent on the part of the voters that Proposition 64's new standing requirements should be applied to pre-existing cases with the result that even cases with proven merit would be terminated. Certainly the text of the initiative and the accompanying ballot materials contain no unambiguous

language to that effect – even though the drafters easily could have included such language. Instead, these defendants and the appellate court below have inferred such intent from Proposition 64's "repeal" of the right of unaffected private persons to sue under the UCL. But as decades of jurisprudence show, the "statutory repeal rule" is simply another tool for discerning legislative intent. It is not a means to circumvent that process.

Thus, merely labeling Proposition 64 as a "statutory repeal" is not sufficient. Even legal changes properly characterized as "repeals" have not been applied retroactively in the absence of a clear intent to that effect. (See, e.g., *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [applying repealed penalty, not new lesser penalty, in order to effectuate Legislature's intent].) Furthermore, contrary to the Court of Appeal's conclusion, the presence or absence of an express savings clause is not determinative of the intent analysis. This Court has declined to apply new statutes to existing cases, even in the absence of a savings clause, when a retroactive intent is not otherwise made plain. (E.g., *id*. at pp. 1048-1049.)

The stakes in this case are high. Hundreds of millions of dollars in restitution and valuable injunctive relief against willful UCL violations could be lost to Californians and cardholders nationwide if the Court of Appeal's order on retroactivity stands. In that event, defendants would receive a windfall. Under the circumstances, it is hard to imagine a more compelling case for this Court's review. In light of the conflicting intermediate appellate decisions on this issue, and the import of the retroactivity decision to the future of this case, plaintiff respectfully requests that the Court grant review. Plaintiff is ready to brief these questions promptly as they pertain to this case.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Underlying Litigation

The Court of Appeal's terse summary of the factual and procedural history of this action is correct as far as it goes. However, the significant

impact of holding Proposition 64 retroactive in this case can be understood only with a fuller discussion of the relevant facts and circumstances.

This action was commenced on February 1, 2000. Visa was originally named as the defendant. MasterCard was added as a defendant on February 15, 2000. Plaintiff brought this action on behalf of the general public, alleging that defendants' imposition of a hidden 1% "currency conversion" fee on purchases made outside this country was unlawful, unfair and deceptive under the UCL. (41 AA 11510-11527.) This case was designated as complex and assigned for all purposes to the Honorable Ronald M. Sabraw, who has overseen every aspect of the case, through discovery, pre-trial dispositive motion practice, trial and post-trial proceedings.

This case has had a complex and lengthy history. Discovery was extensive and vigorously litigated. Plaintiff's counsel defeated three motions for a stay, two motions for judgment on the pleadings, and five complex motions for summary judgment or summary adjudication. (See, e.g., 1 AA 33-89; 2 AA 326-331; 5 AA 1138-1174; 6 AA 1449-1462.) The bench trial lasted for sixty-six days over a six-month period, beginning in May 2002. Nearly a year later, on April 7, 2003, the trial court entered its final decision. (1 RSA 1-125.)

Based on its 218 factual findings, the trial court concluded that defendants' practice of embedding (i.e., hiding), the 1% fee "has the effect of concealing the fee from cardholders and is likely to deceive consumers." (*Id*. at 38.) The court rejected as inconsistent with their own documents and other evidence defendants' assertions that the fee was not a transaction fee but a conversion rate "adjustment." The court also concluded that the 1% fee was a fee imposed on the cardholders, rather than on defendants' member banks as defendants had claimed at trial. (*Id*. at 27-37, 49-62.) To the minimal extent

defendants had recommended that their members disclose the fee, the court found those disclosures to be inadequate. (*Id*. at 15, 39-42, 62-70, 75, 81.)

The trial court therefore concluded that defendants' "intentional concealment" of the fee violates the UCL. (*Id*. at 109.) It "cause[s], or [is] likely to cause, substantial injury" both to consumers and to competition because it prevents consumers from making "informed decisions" about their credit card use. (*Id*. at 80.) Appropriate disclosures about important costs, the court determined, would likely improve competition over the level of the fees and, as a result, "the fees might be reduced or eliminated." (*Id*. at 13.) The trial court ordered both injunctive and monetary relief to remedy defendants' UCL violations. MasterCard and Visa were both ordered to amend their operating rules, regulations and member agreements as necessary to require their members "to make full and effective disclosure of [the network] currency conversion fees" to cardholders. (*Id*. at 120-123.) Because Visa's principal place of business is in California and its wrongful conduct emanated from California, the court concluded that the scope of the injunction as to Visa should be nationwide. (*Id*. at 100.) By contrast, MasterCard is headquartered outside of California. Therefore, the court limited the scope of the injunction as to that defendant to MasterCard's U.S. members who issue credit cards to California consumers. (*Id*. at 120, 122-123.)

In addition, the trial court ordered Visa to restore the 1% fee to all eligible U.S. cardholders, and MasterCard to restore the fee to all eligible California cardholders. (*Id*. at 121, 123.) The court ordered further briefing on whether restitution should be accomplished by means of a direct credit or payment from defendants, or through a notice and claims process. (*Id*. at 121, 123-124.)

After the trial court issued its decision, the parties engaged in more than six months of discovery and briefing on the proper mechanism for restitution. (15 AA 3680-3808; 1 RA 1-145; 1 RSA 126-300; 2 RSA 301-550; 3 RSA

551-803; 4 RSA 804-1077; 5 RSA 1078-1376.) On September 19, 2003, the trial court issued its Order Regarding Means of Effecting Restitution (Restitution Order). (16 AA 3819-3849.) Exercising its discretion, the court selected a notice and claims process. (*Id*. at 3829.) All cardholders who submit a claim will receive 100% of the fees illegally imposed on them. If all eligible cardholders were to submit a claim, the restitution paid would approximate $800 million, plus interest.

More briefing followed on issues related to the form of judgment. (*Id*. at 3906-4124.) The trial court entered judgment on October 31, 2003, awarding both restitution and injunctive relief as described above, and requiring that restitution be paid according to the notice and claims procedure set forth in its Restitution Order. (17 AA 4128-4140.) After their motions for a new trial were denied, defendants appealed the judgment.[3] (*Id*. at 4223, 4226, 4232-4235.)

B. Proposition 64 and the Court of Appeal's Order

A general election was held on November 2, 2004, during the briefing of this appeal. One of the statewide measures passed by the electorate was Proposition 64, an initiative designed to change the standing requirements for private plaintiffs seeking to file suit under California's UCL. Proposition 64 became effective on November 3, 2004. (Cal. Const., art. II, subd. (a).) At

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[3] The judgment also authorized plaintiff to apply for an award of attorney's fees and costs. On July 21, 2004, the trial court issued its order awarding plaintiff a combined fee based on the dual nature of the relief awarded. Specifically, the fee award included $27.6 million pursuant to Code of Civil Procedure section 1021.5, reflecting the benefits conferred by the injunctive relief, and 17.5% of the total amounts paid to cardholders in restitution, awarded under the substantial-benefit doctrine. Defendants appealed that award. Plaintiff cross-appealed the trial court's reduced award of costs. Those appeals are pending before the same intermediate appellate court that authored the opinion at issue here. (*Schwartz v. MasterCard International Incorporated et al.*, Nos. A108180 and A108181.)

defendants' request, the Court of Appeal granted leave for the parties to file supplemental opening and reply briefs addressing whether Proposition 64 applies to cases like this one that were pending on the effective date of the measure.

On July 18, 2004, the Court of Appeal held oral argument solely on the question of whether Proposition 64 applies retroactively to this case. By this time, several intermediate appellate courts, including the First, Second and Fourth Districts, had issued opinions taking conflicting positions on this question. This Court already had granted review in the *Mervyn's* and *Branick* cases.

In a published decision issued on September 28, 2005, the Court of Appeal concluded that Proposition 64 applies to this case. (See Appendix hereto, slip op. at 7, 10.) Specifically, the Court of Appeal held that Proposition 64 repealed the statutory basis for private, unaffected individuals to sue as "private attorneys general" under the UCL. (*Id*. at 7.) Accordingly, pursuant to the "statutory repeal rule," plaintiff's standing could only be preserved if there were an express savings clause or if the judgment had become "vested." (*Id*. at 7-8.) The court observed that the judgment in this case had not yet become final because of the pending appeal. The court further noted that Proposition 64 does not contain an express savings clause which, in its view, is the only relevant evidence of whether the voters intended Proposition 64 to be applied to prior-filed actions. For these reasons, the court concluded there is no authority for plaintiff to continue his prosecution of these claims. (*Id*. at 5-7.)

The Court of Appeal then turned to the question whether plaintiff should be permitted the opportunity to amend his complaint to substitute a public prosecutor or other Proposition 64-qualified plaintiff. After reciting the parties' respective positions on this issue, the court concluded that "[t]hese arguments are properly directed to the trial court." It therefore remanded the

matter to that court "to consider whether the circumstances of this case warrant granting leave to amend." (*Id*. at 12.)

IV. DISCUSSION

A. Proposition 64 Does Not Apply to This Case Because It Contains No Clear Manifestation of Retroactive Intent

Proposition 64 changed the standing requirements for private plaintiffs seeking to bring suit under the UCL. Specifically, as amended by the initiative, the UCL now provides that such a suit may be brought only by a person "who has suffered injury in fact and has lost money or property as a result of defendant's unfair business practices." (Bus. & Prof. Code, § 17204, as amended.) In addition, a plaintiff seeking to bring a suit for "representative claims or relief on behalf of others" must "compl[y] with section 382 of the Code of Civil Procedure," one of the statutory bases for class actions. (Bus. & Prof. Code, § 17203; see also Bus. & Prof. Code, § 17535 [same requirements for false advertising claims].)

Proposition 64 did not alter the substantive grounds for UCL liability. Likewise, it did not repeal any of the remedies available for violation of sections 17200 and 17500. (Bus. & Prof. Code §§ 17203, 17535.) Indeed, the initiative expressly affirms the importance of the UCL as a vital tool for consumer protection and assured voters that the right of citizens to seek relief for wrongful business practices was preserved. (See Plaintiff's Opening Supplemental Brief Regarding Proposition 64 (POB), Ex. A, Proposition 64, §§ 1(a), (d), (f); Ex. C, Arguments and Rebuttals [the initiative "[p]rotects your right to file a lawsuit if you've been damaged"].) Even the UCL's cause of action on behalf of the general public is protected under the express terms of the initiative. Proposition 64 merely required that such "private attorney general" claims, which previously could be brought by any person, may now be brought only by a public prosecutor. (POB Ex. A, Proposition 64 § 1(f).)

In construing a voter initiative, the intent of the voters is "the paramount consideration." (*In re Lance W.* (1985) 37 Cal.3d 873, 889.) The need for a clear statement of retroactive intent is particularly acute when determining the effect of a voter initiative. In the usual course, legislation is drafted, negotiated, debated, and often revised in the Legislature before a vote is taken. Voter propositions, on the other hand, are subject to none of this deliberative process. The drafters of an initiative have unfettered discretion over the text. The voters' understanding of the proposal is based on little more than advertising and brief ballot statements. In short, "the initiative process renders it difficult for the individual voter to become fully informed about any particular proposal." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 266 (dis. opn. of Bird, C.J.).) Attempting to divine voter intent from cursory – or worse, cryptic – initiative language and ballot materials risks an outcome contrary to what the voters intended, and thus contrary to fundamental principles of statutory interpretation.

One of those fundamental principles is that "statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1207.) The presumption against retroactive application of new laws is "'deeply rooted in our jurisprudence'" and animated by "'[e]lementary considerations of fairness . . . that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.'" (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475, quoting *Landgraf v. USI Film Productions* (1994) 511 U.S. 244, 265.)

The retroactivity analysis begins with the language of the initiative itself. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 (*Horwich*).) There is no dispute that Proposition 64 contained no express retroactivity provision. This alone is compelling evidence that the voters did not intend retroactive application. (*Russell v. Superior Court* (1986) 185 Cal.App.3d

810, 818 [the absence of an express retroactivity provision "is, in and of itself, 'highly persuasive' of a lack of intent"].) If anything, the text of the initiative and the accompanying ballot materials suggest an intention that the law apply to future lawsuits only. For example, Proposition 64's Findings and Declaration of Purpose states that "[i]t is the intent of California voters in enacting this act to prohibit private attorneys from ***filing*** lawsuits for unfair competition" where the standing requirements are not met. (POB Ex. A, Proposition 64 § 1(e); see also *id*., § 1(d); Ex. B, Analysis of the Legislative Analyst [the initiative "prohibits any person, other than . . . public prosecutors, from ***bringing*** a lawsuit for unfair competition unless the person has suffered injury and lost money or property"]; *ibid*. [Proposition 64 "requires that unfair competition lawsuits ***initiated*** by any person, other than . . . public prosecutors, on behalf of others, meet the additional requirements of class action lawsuits"].)

As this Court has remarked, however, efforts to "stretch the language of isolated portions of the statute" rarely are successful in determining the voters' intent. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1209.) Both sides of a dispute usually can muster from such scattered words an interpretation favoring their view. Thus, in an effort to glean "clear" retroactive intent, defendants here pointed to the use of the words "pursue" and "prosecute" in the initiative and ballot materials. But these terms, by definition, encompass the commencement of an action as well as ongoing litigation thereafter, and therefore do not ***clearly*** manifest a retroactive intent. Not surprisingly, then, this Court has admonished that a proposition must be examined "as a whole" to determine retroactive intent. (*Ibid*.) As in *Evangelatos*, it is clear that with Proposition 64, "the subject of retroactivity or prospectivity was simply not addressed." (*Ibid*.)

In sum, there is nothing in either the text or ballot materials clearly manifesting any intention of the voters that Proposition 64 be applied to cases

filed before its enactment. Absent that clear intent, retroactive application is precluded. To the extent that the language of the initiative gives rise to conflicting interpretations, this further demonstrates that the initiative must be applied prospectively only. As this Court recently affirmed, "'a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.'" (*Myers v. Philip Morris Cos.* (2002) 28 Cal.4th 828, 841 [citation omitted].)

B. The Statutory Repeal Rule Also Requires Clear Evidence of Retroactive Intent and the Absence of an Express Savings Clause Is Not Dispositive

The Court of Appeal rejected application of these first principles of statutory interpretation to this case and instead concluded that the so-called statutory repeal rule controls here. (Slip op. at 7-8.) But the purpose of that rule, as with the presumption of prospectivity, is to give effect to the Legislature's or voters' intent. (See *Callet v. Alioto* (1930) 210 Cal. 65, 67 (*Callet*).) "'[A] rule of construction . . . is not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent.'" (*People v. Jones* (1988) 46 Cal.3d 585, 599, quoting *In re Estrada* (1965) 63 Cal.2d 740, 746.) This Court has noted repeatedly that "such rules shall always 'be subordinated to the primary rule that the intent shall prevail over the letter.'" (*Estate of Banerjee* (1978) 21 Cal.3d 527, 539 [citation omitted]; see *In re Marriage of Bouquet*, *supra*, 16 Cal.3d at p. 587 [the "transcendent canon of statutory construction" is that "the design of the Legislature be given effect"].) Thus, if the repeal rule applies here, at most it establishes a presumption of legislative intent that can be rebutted with evidence of a contrary intent.

As it has been developed in both criminal and civil jurisprudence, the repeal rule will be applied only where the new law alters the underlying cause of action or remedy to such a degree as to "conclusively manifest" the

Legislature's (or voters') intention. (*Krause v. Rarity* (1930) 210 Cal. 644, 654; see, e.g., *In re Estrada*, *supra*, 63 Cal.2d at p. 745 [where a new law significantly lessens penalties for certain conduct, the Legislature "must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply"].) Because, as here, intent is not always expressly stated, courts examine not just the language of a law but also the "context of the legislation, its objective, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy and contemporaneous construction" to divine the legislative purpose. (*Fox v. Alexis* (1985) 38 Cal.3d 621, 629; see also *Horwich*, *supra*, 21 Cal.4th at p. 276 [in discerning voter intent, the court must bear in mind "'the object to be achieved and the evil to be prevented'"] [citation omitted].) A new law must not be construed literally if doing so would result in "absurd consequences" the voters did not intend. (*Horwich*, *supra*, 21 Cal.4th at p. 276.)

Examination of all the circumstances to determine the temporal reach of Proposition 64 is a crucial step that cannot be missed. This Court has not hesitated to decline to apply new laws retroactively when evidence of such an intent was lacking, despite the fact that they plainly constituted a "repeal." For example, in *In re Pedro T.*, *supra*, 8 Cal.4th 1041, the defendant was sentenced under a provision that temporarily increased the penalty for car theft. The increased penalty was "repealed" by operation of a sunset provision. On appeal, the defendant insisted that he was entitled to the benefit of the lesser punishment. (*Id*. at p. 1044.) The Court disagreed, even though the old penalty had been repealed. It concluded that there was no evidence that the Legislature intended the higher penalty not to be applied to all offenses committed throughout its effective period. (*Id*. at p. 1049; see also *Hopkins v. Anderson* (1933) 218 Cal. 62, 66-67 [Court acknowledged the repeal canon, but did not apply a constitutional amendment to pending cases

because there was "nothing in the [amendment] indicating that it was intended to have a retroactive application"].)

Here, the Court of Appeal held that the repeal rule "squarely" applied to Proposition 64 because that measure "repealed two ***purely statutory rights***: (1) an uninjured person's statutory right to prosecute a UCL claim on behalf of the general public; and (2) a private party's statutory authorization to pursue a representative action." (Slip op. at 7, emphasis in original.)[4] But merely categorizing Proposition 64 as a statutory repeal is not sufficient. It does not address the fundamental issue of whether this particular "repeal" was intended to operate retrospectively.

To answer that question, it is necessary to examine the nature of the change wrought by Proposition 64 and examine all evidence of the voters' intent. The repeal rule applies only when a statutory "cause of action or remedy" is eliminated. (See *Governing Bd. of Rialto Unified School Dist. v. Mann* (1977) 18 Cal.3d 819, 829 (*Mann*); *Callet*, *supra*, 210 Cal. at p. 67.) As previously noted, Proposition 64 did not eliminate any UCL cause of action – not even the cause of action on behalf of the general public. Further, it left intact all of the familiar equitable remedies permitted under the statute. The initiative changed who could bring suit, not the substantive bases for the suit. Conduct that occurred prior to passage of the measure which was actionable then remains actionable now. The public's right to be protected from such unfair business practices remains unchanged, and the remedies available then are available now.

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[4] If by this latter statement the Court of Appeal meant to say that all private representative UCL actions are now precluded, it was clearly mistaken. Business & Professions Code section 17203 expressly preserves the right of private plaintiffs to bring representative claims if they are themselves injured as a result of the wrongful conduct, and if they comply with Code of Civil Procedure section 382. (See Bus. & Prof. Code, § 17203, as amended.)

Because Proposition 64 left intact the most critical aspects of a UCL cause of action, it is impossible to interpret the standing alterations – even if properly characterized as a "repeal" – as an unequivocal signal that the measure was intended to be applied retroactively to pending actions that indisputably allege conduct still prohibited under the statute. As noted, Proposition 64's own statement of purpose includes affirmations that the UCL maintains its status as a vital mechanism to protect California consumers. To be sure, Proposition 64 was designed to help eliminate "frivolous" litigation. (RJN Ex. A, Proposition 64, § 1(a).) But whatever the proponents may have had in mind when they drafted it, nothing in the measure equates all pending "private attorney general" litigation with "frivolous" litigation. On the contrary, the measure states only that there had been "some" misuse of the statute. (*Id*., Proposition 64, § 1(b).) All indications, then, are that a blanket application of Proposition 64 to pending UCL suits, possibly resulting in the dismissal of suits like this one with ***proven*** merit and the elimination of valuable relief to the public, was the furthest thing from the mind of the voters when they approved the initiative. Indeed, such retroactive application would seriously ***undermine*** the voters' intent by providing a windfall to businesses that have violated the UCL.

The Court of Appeal here, however, held that the only relevant indicator of voter intent in a repeal statute is the presence or absence of an express savings clause. (Slip. op. at 8, citing *Younger v. Superior Court* (1978) 21 Cal.3d 102, 110 (*Younger*).) This Court's precedents cannot fairly be read so narrowly. In the *Younger* and *Mann* decisions, this Court approached the retroactivity of repeal statutes the same way it approached any problem of statutory interpretation – with the purpose of determining the intent of the measure. In *Mann*, for example, the Court applied the repeal rule only after considering the history of and reasons for the new law that prohibited public entities from terminating employment based on marijuana arrests and

convictions. (*Mann*, *supra*, 18 Cal.3d at pp. 827-828.) The Court found that the Legislature made clear the intended temporal reach of the law. The law provided that no sanction could be imposed on the basis of marijuana arrests or convictions "'***on or after*** the date the records of such an arrest or conviction are required to be destroyed . . . or ***two years from the date of such conviction*** or arrest without conviction ***with respect to*** arrests and ***convictions occurring prior to January 1, 1976***.'" (*Id*. at p. 827, emphasis by the court [citation omitted].)

The law at issue in *Younger*, *supra*, 21 Cal.3d 102, originally provided that the superior courts may order destruction of official records of marijuana arrests and convictions. The real-party-in-interest obtained an order of destruction from the superior court. The Attorney General challenged the order through a writ petition. While that writ was pending, the Legislature changed the law to vest the authority to order records destruction with the Department of Justice. The real-party-in-interest sought an order from the Attorney General, who refused to act on the application. (*Id*. at p. 108.)

Relying principally on *Mann*, this Court held that the new law revoked the jurisdiction of the courts to authorize records destruction, and thus required action by the Attorney General. (*Id*. at p. 109.) However, the Court acknowledged the potential for proof of a contrary legislative intent. In response to the Attorney General's assertion that the new legislation had the same intent as the old, this Court responded: "The only legislative intent relevant in such circumstances would be a determination to save this proceeding from the ordinary effect of repeal illustrated by such cases as *Mann*. But no such intent appears." (*Id*. at p. 110.) Plainly, if there had been evidence of a different intent, the repeal rule would not have applied.

Significantly, this Court has made clear in cases preceding and postdating *Mann* and *Younger* that the presence or absence of an express savings clause is not conclusive. For example, in *In re Pedro T.*, *supra*, 8

Cal.4th 1041, this Court held that the sunset clause did not have retroactive effect despite the absence of a savings clause. The majority disagreed with the dissent's contention that "the omission [of a savings clause] creates a virtual presumption of retroactivity." (*Id*. at p. 1056 (dis. opn. of Justice Arabian).) The Court focused instead on the intent of the Legislature "at the time of the enactment." (*Id*. at p. 1048.) It concluded that there was no evidence to suggest that the Legislature's purpose in enacting higher penalties had ceased to operate as of the sunset date with respect to conduct occurring during the temporary period. (*Ibid*.) Rather, "the very nature of a sunset clause, as an experiment in enhanced penalties, establishes – in the absence of evidence of a contrary legislative purpose – a legislative intent [that] the enhanced punishment apply to offenses committed throughout its effective period." (*Id*. at p. 1049.)

More recently, in *People v. Nasalga* (1996) 12 Cal.4th 784, this Court addressed the impact of an amendment that lessened the punishment on thefts committed before its enactment. The amendment increased the property loss required for sentencing enhancements, and contained no savings clause. (*Id*. at pp. 788-790.) Applying *In re Pedro T.*, the Court looked "for any other indications of legislative intent" in the absence of a savings clause. (*Id*. at pp. 793-794.) Finding no intent to limit the application of the amendment to offenses committed after its enactment, the Court held that the ameliorative statute applied retroactively. (*Id*. at pp. 794-798; see also *County of Alameda v. Kuchel* (1948) 32 Cal.2d 193, 198-199 [holding that express savings clause is not necessary if there is another contemporaneous expression of the Legislature's intent not to save rights under a repealed statute].)

Other cases also illustrate that express savings clauses are not the only evidence of legislative intent. Just recently, the Second Appellate District issued its decision in *Kleeman v. Workers' Compensation Appeals Board* (2005) 127 Cal.App.4th 274, in which this Court denied review. There, the

court dealt with repeal amendments to the Labor Code. First, the court recognized that its primary obligation was to "determine[] and give[] effect" to the Legislature's intent. (*Id*. at p. 282.) The court concluded, based on express statutory language, that the amendments were intended to apply to the injuries suffered by the plaintiff, whether those amendments were characterized as prospective or retrospective. (*Id*. at p. 285-286.) The court invoked the repeal rule. (*Id*. at pp. 283, 286.) However, its analysis turned not on whether there was a savings clause, but on other statutory language indicating the Legislature's actual intent. (*Id*. at pp. 285-286.)

Proposition 64 does not contain an express savings clause, but it does contain unequivocal expressions of an intention to preserve UCL claims and remedies for the benefit of consumers and businesses. (RJN Ex. A, §§ 1(a), (d), (f), (g), 2, 3; Ex. C, Proposition 64, Arguments and Rebuttals [the initiative "[p]rotects your right to file a lawsuit if you've been damaged"].) These facts are utterly inconsistent with an intention that the initiative be applied retroactively to terminate all preexisting "private attorney general" actions, regardless of how meritorious, and regardless of whether – as here – judgment has been reached in favor of the plaintiff.

Accordingly, even if Proposition 64 constitutes a "statutory repeal," it would be contrary to the voters' intent to apply the repeal rule reflexively to undo the judgment in this case, and thereby potentially rob millions of consumers of monetary and injunctive relief from proven UCL violations and provide the violators with a huge windfall.[5]

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[5] If this Court should conclude that Proposition 64 applies retroactively to cases filed before its enactment, then it should also conclude, as did the Court of Appeal here, that plaintiffs in such cases should be permitted the opportunity to amend to substitute a public prosecutor and/or other qualified plaintiff. (Slip op. at 11-12.)

V. CONCLUSION

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

DATED: November 7, 2005

Respectfully submitted,

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RULE 28.1 CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the **PETITION FOR REVIEW** uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this brief comprises 6,005 words according to the word count provided by Microsoft Word word-processing software.

DATED: November 7, 2005

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on November 7, 2005, declarant served the **PETITION FOR REVIEW** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

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

I declare under penalty of perjury that the foregoing is true and correct. Executed this seventh day of November, 2005, at San Diego, California.

_____

Terree DeVries