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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

CENTER FOR BIOLOGICAL DIVERSITY, INC.; PETER GALVIN,

Plaintiffs,

v.

FPL GROUP, INC.;
FPL ENERGY, LLC;
ESI BAY AREA GP, INC.;
ESI BAY AREA, INC.;
GREP BAY AREA HOLDINGS, LLC;
GREEN RIDGE POWER LLC;
ALTAMONT POWER LLC;
ENXCO, INC.;
SEAWEST WINDPOWER, INC.;
PACIFIC WINDS, INC.;
WINDWORKS, INC.;
ALTAMONT WINDS, INC.,

Defendants.

Case No. RG 04 183113

**PLAINTIFFS CBD AND GALVIN'S OPPOSITION TO DEFENDANTS' DEMURRER**

**COMPLEX CASE**

Date: February 10, 2005
Time: 9:00 a.m.
Dept.: 22
Judge: The Hon. Ronald M. Sabraw

Action filed: November 1, 2004
Trial Date: Not set

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### STATUTES

Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY, INC. ("CBD") and Peter Galvin hereby oppose defendants' demurrer. Although the First District Court of Appeal has now conclusively determined that Proposition 64 is not retroactive, *Californians for Disability Rights v. Mervyn's* (No. A106199; Feb. 1, 2005), plaintiffs submit this opposition for the aid of the Court.

## NATURE OF THE CASE

The region around Altamont Pass has one of the highest known densities of Golden Eagles. It is also rich in other raptors as well, like hawks, falcons, and owls. For thousands of years these magnificent birds have soared the skies free. Starting twenty-five years ago, the wind power industry began erecting wind turbines on the ridges where the eagles roam. Eventually, there were over 5,000 turbines installed at Altamont Pass. No Environmental Impact Report was prepared before these thousands of turbines were installed.

In 1984, the first reports came in that the turbines were killing raptors. Notable scientific studies and reports were published in 1991, 1992, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, and 2003. The latest study, published by the California Energy Commission in August 2004, shows that Altamont Pass wind turbines are currently killing from 880 to 1300 eagles, hawks, falcons, and owls each year, including between 75 and 116 Golden Eagles annually.

The result is that, over the past twenty-five years, the Altamont Pass wind power industry in its pursuit of profits has illegally slaughtered 17,000 to 26,000 or more eagles, hawks, falcons, and owls, and tens of thousands of other protected birds. As stated in the Complaint, these killings are criminal violations of the federal Migratory Bird Treaty Act, the federal Bald and Golden Eagle Protection Act, and numerous provisions of the state Fish and Game Code.

Defendants for the most part are not the original operators of the wind turbines, but entities who took over operations in 1998, after the original operators had gone bankrupt and at a time when it was well known that the Altamont Pass wind turbines were killing hundreds of eagles, hawks, falcons, and owls each year. The Energy Commission has now called on defendants to reduce their killing by 50% in three years and 85% in six years, and to pay millions of dollars per year in restitution for the birds they will still be killing. Defendants, however, have to date taken no effective steps to reduce this slaughter, and to date have escaped all legal liability for their crimes.

## ARGUMENT

### I. Standing And The Scope Of Restitution Under The Former Version Of The UCL

The Court's tentative decision identified two types of private actions that were available under the former version of the Unfair Competition Law, section 17200 et seq. (the "prior UCL"). One is the action brought by a plaintiff "acting for the interests of . . . the general public" to vindicate the People's interest as sovereign in the enforcement of their laws. The other is an individual UCL action in which the plaintiff has been harmed and seeks relief only for herself.

These two extremes, however, do not encompass the full spectrum of actions recognized under the prior UCL. The Supreme Court has recognized that private representative UCL actions for restitution are brought not to vindicate the abstract sovereign interest of the People in the enforcement of their laws, but "for the benefit of injured parties." *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 138 (2000); *id.* at 138 n.18 ("the absent persons *on whose behalf* the action is prosecuted"), 121 ("an action that is not certified as a class action, but is brought *on behalf of* absent persons by a private party under the unfair competition law") (emphasis added). The Supreme Court defines representative actions as actions on behalf of injured persons, not the public in general: "We use the term 'representative action' to refer to a UCL action that is not certified as a class action in which a private person is the plaintiff and seeks disgorgement and/or restitution on behalf of persons other than or in addition to the plaintiff." *Id.* at 126 n.10. Indeed, the plaintiffs in *Kraus* did not bring the action on behalf of the general public, but only "on behalf of themselves and all other present and former tenants of the defendants." *Id.* at 125 n.9.

Unlike a private representative action, a public prosecutor UCL action is not brought on behalf of injured persons but "in the name of the people." Bus. & Prof. Code § 17204. It "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." *People v. Pacific Land Research Co.*, 20 Cal.3d 10, 17 (1977); *Payne v. National Collection Systems, Inc.*, 91 Cal.App.4th 1037, 1045 (2001) ("An action brought pursuant to . . . section 17200 et seq. by a prosecutor is fundamentally different from a class action *or other representative* litigation." (emphasis added); 1046 ("an unlawful competition law lawsuit commenced by a prosecutor is brought fundamentally for the benefit of the public and as a law

enforcement action"). Any individual restitution or benefit to those who have been injured is purely incidental, and prosecutors are free to sacrifice the interests of injured persons in their pursuit of what they believe to be the public interest. *Pacific Land*, 20 Cal.3d at 17-18 & n.6 (p. 17, restitution "is not the primary object of the suit, as it is in most private class actions"; p. 18, the prosecutor's "role as a protector of the public may be inconsistent with the welfare of the [injured persons] so that he could not adequately protect their interests"); *Payne*, 91 Cal.App.4th at 1045-47. The People as sovereign have no right to restitution; their monetary remedy is the civil penalty authorized by section 17206 in an action "brought in the name of the people."

Representative actions on behalf of injured parties rather than the public in general were possible under the prior UCL because it decoupled the usual unity between status as a party and the right to relief. Ordinarily, status as a party and the right to relief are coextensive—only those who are parties have a right to receive relief. Uniquely, however, the prior UCL separated party status from the scope of available relief and empowered courts to grant individualized relief to persons who had never appeared as parties and who were not in privity with the plaintiff, and to grant relief to nonparties even if the plaintiff had no personal right to relief. Party status was authorized by section 17204, while section 17203 separately authorized relief to injured nonparties. Thus, the Supreme Court has held that the "person[s] in interest" in section 17203 who are entitled to restitutionary relief are the persons with *an interest in the money or property* acquired by the defendant, not the persons who are real parties in interest *in the lawsuit*: "when we refer to orders for restitution, we mean orders compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person." *Kraus*, 23 Cal.4th at 126-127.

That the "person in interest" in the property is not a real party in interest in the lawsuit is demonstrated by the oft-noted fact that UCL actions, unlike class actions, are not res judicata against persons in interest in the property taken by the defendant. *Kraus*, 23 Cal.4th at 126, 138. If every absent "person in interest" were also a real party in interest, the lawsuit would be res judicata against them. *Ibid.*; *accord, Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th

163, 172 (2000) (rejecting argument that "an award of restitution to *persons who are not parties to the action* in a representative UCL action by a private individual is constitutionally impermissible unless the action is certified as a class action" (emphasis added)). Thus, a plaintiff who had standing because of her own injuries could bring an action on behalf of her own interest but could seek relief for all who lost money or property.

Under the prior UCL, the ability to aggregate claims in a representative action made it feasible to litigate many UCL claims that neither public prosecutors nor private individuals could otherwise pursue: "[R]epresentative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions. . . . These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts." *Kraus*, 23 Cal.4th at 126.

In addition, under the prior UCL an organization like CBD could bring suit "acting for the interests of . . . its members" who have been harmed. Bus & Prof. Code former § 17204. (As discussed in section III(B) below, this remains the case even after Proposition 64.) It could obtain relief both on behalf of its injured members and on behalf of other injured nonparties.

Accordingly, in applying the settled canons of retroactivity to Proposition 64, a court must take into account that under the prior UCL representative actions for restitution were on behalf of specific absent injured parties and also that organizations like CBD had standing to represent the interests of their members.

## II. Proposition 64 May Only Be Applied Prospectively

### A. A New Statute Only Applies Prospectively Unless It Clearly, Unambiguously, And Inescapably Manifests Its Retroactive Intent

It has long been settled that statutory changes apply prospectively only, absent a clearly expressed intent by the enacting body that the new statute apply retroactively. " '[It] is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.' This rule has been repeated and followed in innumerable decisions." *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1207 (1988)

(citation omitted). Twice in the same day last December, our Supreme Court reiterated this rule yet again: It is "the well-established rule that legislation is deemed to operate prospectively only, unless a clear contrary intent appears." *City of Long Beach v. Dept. of Ind. Relations*, 34 Cal.4th 942, 953 (2004); *accord*, *Elsner v. Uveges*, 34 Cal.4th 915, 936 (2004).[1]

The rule against retroactivity is of ancient lineage: " '[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.' " *McClung*, 34 Cal.4th at 475. "California courts apply the same 'general prospectivity principle' as the United States Supreme Court." *Myers v. Philip Morris Cos., Inc.*, 28 Cal.4th 828, 841 (2002). "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied." *United States Fidelity & Guaranty Co. v. United States*, 209 U.S. 306, 314 (1908).

Thus, under this unusually firm rule of statutory construction, a statute is retroactive only if the enacting body intends that it be retroactive *and* expresses that intent either in an express retroactivity provision or in an equally clear, unambiguous, and inescapable statement of retroactive intent: "California courts comply with the legal principle that unless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application.' " *Myers*, 28 Cal.4th at 841 (emphasis original), 844 ("a statute may be applied retroactively only if it

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[1] Nor is there any merit to defendants' assertion that the rule against retroactivity applies only to statutes modifying common law causes of action (Defs. Mem. at 8 n.11). The Supreme Court has consistently applied the rule against retroactivity to statutes modifying statutory causes of action and statutory rights. *See, e.g., City of Long Beach v. Dept. of Ind. Relations*, 34 Cal.4th at 953; *McClung v. Employment Dev. Dept.*, 34 Cal.4th 467, 475 (2004); *Aetna Casualty & Surety Co. v. Ind. Accident Comm'n*, 30 Cal.2d 388, 393 (1947).

contains express language of retroactivity *or* if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application" (emphasis original)).

In the absence of an express retroactivity provision, there must be an "unequivocal and inflexible statement of retroactivity." *Myers*, 28 Cal.4th at 843. Any lesser expression of retroactive intent is insufficient to make the statute retroactive: " '[A] statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.' " *Myers*, 28 Cal.4th at 841; *see also ibid.* ("retroactive effect [is] adequately authorized by a statute only when statutory language [is] so clear that it could sustain only one interpretation" (internal quotation marks omitted)).

Here, Proposition 64 lacks any express retroactivity provision. As was true of Proposition 51 in *Evangelatos* is equally true of Proposition 64: "The drafters of the initiative measure in question, although presumably aware of this familiar legal precept, did not include any language in the initiative indicating that the measure was to apply retroactively to causes of action that had already accrued and there is nothing to suggest that the electorate considered the issue of retroactivity at all." *Evangelatos*, 44 Cal.3d at 1194; *see also id.* at 1211 ("the drafters of Proposition 51, in omitting any provision with regard to retroactivity, must have recognized that the statute would not be applied retroactively"), 1212-13 ("[T]here is no reason to believe that the electorate harbored any specific thoughts or intent with respect to the retroactivity issue at all. Because past cases have long made it clear that initiative measures are subject to the ordinary rules and canons of statutory construction, informed members of the electorate who happened to consider the retroactivity issue would presumably have concluded that the measure—like other statutes—would be applied prospectively because no express provision for retroactive application was included in the proposition." (citations omitted)).[2]

Nothing in the language of Proposition 64 even suggests that it might be applied retroactively, much less clearly, unambiguously, and inescapably mandates that conclusion. To the contrary, in its declarations of purpose the statute states that "It is the intent of the California

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[2] Before the election, even Proposition 64's proponents thought that it was not retroactive and told the voting public that it would not be retroactive. Sigler Decl., ¶¶ 6, 7 & Ex. D.

voters in enacting this Act to prohibit private attorneys from *filing* lawsuits for unfair competition where they have no client who has been injured in fact . . . ." (emphasis added). This is a statement of intent that Proposition 64 be prospective only, prohibiting the filing of future actions, but not retroactively barring already-filed lawsuits. Nor does anything in the Attorney General's summary or the Legislative Analyst's analysis of Proposition 64 even hint that the electorate intended the measure to be retroactive.

Because there is no evidence, much less "*very clear*" evidence (*Myers*, 28 Cal.4th at 841 (emphasis original)), that the electorate intended Proposition 64 to apply retroactively to actions filed before the election, defendants' demurrer must be overruled. Instead, "reflecting the common-sense notion that it may be unfair to change 'the rules of the game' in the middle of a contest, . . . the general legal presumption of prospectivity applies with full force to a measure, like the initiative at issue here, which substantially modifies a legal doctrine on which many persons may have reasonably relied in conducting their legal affairs prior to the new enactment." *Evangelatos*, 44 Cal.3d at 1194.

Nor does the Court's characterization of the People as the real party in interest in "general public" UCL actions overcome this glaring absence of retroactive intent. Even under the Court's analysis, the question is whether it is certain that the electorate intended to put at risk meritorious UCL actions being pursued by private individuals on its behalf or on behalf of injured nonparties by suddenly dumping hundreds of UCL cases into the laps of unprepared and overworked state and county prosecutors who would have only a brief time to decide whether, whatever the merits of the claim, they have the resources in time and money to pursue it. Such a course will inevitably result in the dismissal of many meritorious actions, especially in light of the state and local budget crises. And in the case of lawsuits involving losses to injured nonparties, many persons will lose forever any remedy, whether because of the statute of limitations or because individual actions are economically infeasible. *Kraus*, 23 Cal.4th at 126. It is far more probable that the electorate would have intended an orderly transition by establishing Proposition 64 as the structure for the future, but allowing cases filed before the election to proceed as they otherwise would have.

**B. Proposition 64 Is Not A Procedural Statute**

The Supreme Court recently explained how retroactivity principles apply in the case of statutes that alter the procedure by which a cause of action is tried without altering the rights of the plaintiff or the liabilities of the defendant under that cause of action: "However, th[e] rule [against retroactivity] does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even though such trials may involve the evaluation of civil or criminal conduct occurring before enactment. This is so because these uses typically affect only future conduct—the future conduct of the trial. 'Such a statute "is not made retroactive merely because it draws upon facts existing prior to its enactment . . . . [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future." For this reason, we have said that "it is a misnomer to designate [such statutes] as having retrospective effect." ' [¶] In deciding whether the application of a law is prospective or retroactive, we look to function, not form. We consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies. Does the law 'change[] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct[?]' Does it 'substantially affect[] existing rights and obligations[?]' If so, then application to a trial of preenactment conduct is forbidden, absent an express legislative intent to permit such retroactive application. If not, then application to a trial of preenactment conduct is permitted, because the application is prospective." *Elsner*, 34 Cal.4th at 936-937 (citations omitted). (The one-sided formulation in *Brenton v. Metabolife Int'l, Inc.*, 116 Cal.App.4th 679, 688-89 (2004), focusing only on changes to the defendant's liabilities and ignoring changes to the plaintiff's rights, thus is an incomplete and inaccurate statement of the law.)

Thus, the question is whether the statute acts retrospectively by altering preexisting rights or obligations or instead merely alters the procedure for resolving a cause of action while leaving both the plaintiff's rights and the defendant's liabilities untouched. Function, not form, controls.

Here, there is no doubt that Proposition 64 is not a statute that merely changes the pretrial and trial procedures to be used to resolve the litigation. Rather, it changes which persons can bring an action against the defendant for the defendant's wrongful conduct and which types of actions

can be brought. Before Proposition 64's enactment, any person harmed could bring a private representative action for restitution on behalf of herself and all other persons harmed against a defendant who had committed acts of unfair competition, and any person at all could bring an action on behalf of the general public. Private representative actions on behalf of injured nonparties played a crucial and unique role in UCL enforcement and were not just public prosecutor actions by another name. *Kraus*, 23 Cal.4th at 126. After Proposition 64, private representative actions are eliminated.

Extinguishing the right to bring an action that a person previously possessed is a change that " 'substantially affect[s] existing rights and obligations' " and thus is an impermissible retroactive effect. *Elsner*, 34 Cal.4th at 936-937. To apply Proposition 64 to bar actions properly filed before its enactment would be a retroactive effect because "a retroactive effect is one that 'impair[s] rights a party possessed *when he acted*.' " *Myers*, 28 Cal.4th at 847 (emphasis original); *accord*, *Aetna*, 30 Cal.2d at 391 ("A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute."). At the time CBD and Mr. Galvin filed this action before Proposition 64's enactment, they possessed the right to bring a private representative action on behalf of all who have been harmed by defendants' conduct *and* the right to bring an action on behalf of the general public to vindicate its interest in law enforcement; CBD also had the right to bring an action on behalf of its members. Not only CBD and Mr. Galvin but many nonparties have relied on this lawsuit to remedy defendants' illegal conduct. To bar this action now impairs the rights CBD and Mr. Galvin possessed when they acted and filed suit, and is an impermissible retroactive application given the absence of retroactive intent by the voters. *McClung*, 34 Cal.4th at 475 ("a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature' ").

### C. Proposition 64 Does Not Fall Within The Exception To The Rule Against Retroactivity For Statutes That Abolish Or Lessen Liability

Defendants also rely on the following narrow exception to the rule against retroactivity: Where a statute abolishes or lessens the duty or liability of the defendant and makes the

defendant's conduct to that extent no longer wrongful, it is presumed that the enacting body intended the statute to apply to pending actions, absent any evidence of a contrary legislative intent. *Governing Board v. Mann*, 18 Cal.3d 819, 829 (1977); *People v. Babylon*, 39 Cal.3d 719, 725 & n.10 (1985) (citing *Governing Board v. Mann*; "absent a saving clause, a defendant is entitled to the benefit of a more recent statute which mitigates the punishment for the offense or decriminalizes the conduct altogether"); *In re Estrada*, 63 Cal.2d 740, 745 (1965) ("When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act."). Whether this exception applies is judged by examining whether the duties, liabilities, and obligations to which the defendant is subject have been lessened or extinguished by the new statute.[3]

In *Governing Board v. Mann*, the plaintiff school district sued to discharge the defendant teacher who had been convicted of a marijuana offense more than two years earlier. The Legislature then enacted a statute forbidding the discharge, "on or after" the date two years after the date of conviction, of teachers convicted of marijuana offenses. The Court held that because the Legislature had abolished the previously-existing ground on which defendant could have been discharged, his liability for discharge was extinguished retroactively. 18 Cal.3d at 829-30.

The Supreme Court has never applied this exception except in the case of statutes that have abolished the duty or liability to which the *defendant* was previously subject. The rationale for the

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[3] This exception originated in the field of criminal law, in cases in which the law under which a defendant was being prosecuted was entirely repealed, making the previously proscribed conduct lawful. *Governing Board v. Mann*, 18 Cal.3d at 829; *People v. Babylon*, 39 Cal.3d at 725 & n.10. The exception to the rule against retroactivity remains the same in both civil and criminal cases, as *Governing Board v. Mann* notes. 18 Cal.3d at 829-30. The decisions in *Governing Board v. Mann*, 18 Cal.3d at 829, and *In re Estrada*, 63 Cal.2d at 746-47, both trace the exception back to *Spears v. County of Modoc*, 101 Cal. 303 (1894) and beyond. The decision in *Governing Board v. Mann*, 18 Cal.3d at 829, cites *In re Estrada* and *People v. Rossi*, 18 Cal.3d 295, 298-302 (1976); *Governing Board v. Mann* in turn is cited by *People v. Babylon*, 39 Cal.3d at 725. And the Supreme Court has characterized its holding in *Governing Board v. Mann* as a reaffirmation of its similar holding in *People v. Rossi*. "*Rossi* represents a logical extension of the principles developed in the line of cases dealing with the common law rule, as we recognized in reaffirming its holding in *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829." *People v. Collins*, 21 Cal.3d 208, 213 (1978).

exception, which is based on legislative intent, extends no further: "[The exception] is based on presumed legislative intent, it being presumed that the repeal was intended as an implied legislative pardon for past acts. This rule results, of course, in permitting a person who has admittedly committed a crime to go free, it being assumed that the Legislature, by repealing the law making the act a crime, did not desire anyone in the future whose conviction had not been reduced to final judgment to be punished under it. But this rule only applies in its full force where there is an outright repeal, and where there is no other new or old law under which the offender may be punished." *Sekt v. Justice's Court of San Rafael Township*, 26 Cal.2d 297, 304-305 (1945) (citation omitted); *accord, People v. Dennis*, 17 Cal.4th 468, 504 (1998) ("The fundamental function of the *Estrada* rule is to further a legitimate legislative intent that is manifested by a change in the punishment prescribed for an offense."); *People v. Nasalga*, 12 Cal.4th 784, 792 (1996) ("legislative intent is the 'paramount' consideration"); *In re Pedro T.*, 8 Cal. 4th 1041, 1045 (1994) ("The basis of our decision in *Estrada* was our quest for legislative intent. Ordinarily when an amendment lessens the punishment for a crime, one may reasonably infer the Legislature has determined imposition of a lesser punishment on offenders thereafter will sufficiently serve the public interest."); *People v. Collins*, 21 Cal.3d at 212 ("In *Sekt v. Justice's Court* . . . we discussed the rule's theoretical basis: it presumes the Legislature, by removing the proscription from specified conduct, intended to condone past acts."), 213 ("an amendment eliminating criminal sanctions is a sufficient declaration of the Legislature's intent to bar all punishment for the conduct so decriminalized"). "[B]ecause the rule is based on a presumed legislative intent, it does not apply automatically upon the repeal of a statute. . . . That is, where the circumstances of the repeal do not reasonably give rise to the presumption of a legislative pardon and remission of crimes not reduced to final judgment, the rule is inapplicable and a prosecution may be maintained even in the absence of a savings clause." *People v. Alexander*, 178 Cal.App.3d 1250, 1261 (1986).

Thus, as *Evangelatos* explains, the exception has little application outside of criminal law: "In *In re Estrada*, . . . the court also held that a statutory enactment should be applied retroactively despite the absence of an express retroactivity clause, but that case involved considerations quite distinct from the ordinary statutory retroactivity question. In *Estrada*, the Legislature had

amended a criminal statute to reduce the punishment to be imposed on violators . . . . [¶] . . . [T]he rationale for the *Estrada* ruling bears little relationship to the determination of the retroactivity of most nonpenal statutes, and, as noted below, other jurisdictions have not applied the special rule applicable to ameliorative penal provisions in determining the retroactivity of a general tort reform measure like Proposition 51. We similarly conclude that the *Estrada* decision provides no guidance for the resolution of this case." *Evangelatos*, 44 Cal.3d at 1210 n.15.

This narrow exception has no application here, either. Proposition 64 has not altered the contours of any defendant's liability under section 17200, much less abolished liability entirely for any defendant. Section 17200 continues to proscribe exactly the same wrongful conduct as it did before Proposition 64's enactment. That wrongful conduct is subject to exactly the same remedies as it was before Proposition 64's enactment. Proposition 64 has changed only who may act as plaintiff to enforce that liability and those remedies against a defendant. It has changed nothing on the defendant's side of the equation, but has acted only on the plaintiff's side.

In particular, Proposition 64 has not made lawful the conduct for which this action seeks to hold these defendants liable. Their killing of raptors and other birds remains entirely unlawful and their liability for those killings under section 17200 remains entirely unchanged.

Moreover, nothing in Proposition 64 suggests that the voters intended to release past violators of section 17200 from liability and let them off scot-free. To the contrary, the findings and declarations of purpose emphasize that liability will continue unchanged because prosecutors will continue to "be authorized to file and prosecute actions on behalf of the general public." Thus, the exception for statutes abolishing the defendant's liability has no application here.

## III. Even If Proposition 64 Were Retroactive, This Action Would Still Continue

### A. Mr. Galvin Has Individual Standing Under Proposition 64

In California, all wildlife, including the many hundreds of eagles, hawks, falcons, owls, and other birds killed annually by defendants, is owned by the people of the state. Fish & Game Code § 1600 ("Fish and wildlife are the property of the people"); *Betchart v. Dept. of Fish & Game*, 158 Cal.App.3d 1104, 1106 (1984) ("California wildlife is publicly owned"). Thus, each Californian owns an equal and undivided property interest in the birds killed by defendants. The state as

## B. CBD Has Associational Standing Under Proposition 64 To Represent Its Injured Members

Representative actions can take many forms. One form that California has long recognized is associational standing, by which an organization has standing to represent the interests of its injured members. *Associated Builders & Contractors v. San Francisco Airports Comm'n*, 21 Cal.4th 352, 361 (1999); *National Audubon Society v. Superior Court*, 33 Cal.3d at 431 n.11; *Residents of Beverly Glen, Inc. v. Los Angeles*, 34 Cal.App.3d 117, 125-26 (1973). Thus, CBD has associational standing to represent its members "who ha[ve] suffered injury in fact and ha[ve] lost money or property as a result of such unfair competition." Bus. & Prof. Code § 17204.

Nor is Proposition 64's requirement of compliance with Code of Civil Procedure section 382 a barrier to associational standing by CBD on behalf of its members. Section 382 is a broad authorization for representative actions that is not limited to class actions; indeed, it nowhere uses the terms "class" or "class action." Even before the 1872 code enactment of section 382,

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The decisions in *Missouri v. Holland*, 252 U.S. 416 (1920), and *Toomer v. Witsell*, 334 U.S. 385 (1948), relied on by defendants, are not to the contrary. Those were cases where a state government sought to interpose state ownership of wildlife to avoid specific obligations that the federal constitution would otherwise impose on it—the treaty-making power and federal statutory law in *Missouri v. Holland*; the privileges and immunities clause in *Toomer*. Those cases stand for the unsurprising proposition that a state cannot use its ownership of wildlife to avoid its federal constitutional obligations—Missouri cannot claim that its ownership of wildlife trumps the federal government's treaty-making powers and South Carolina cannot claim that its ownership of wildlife allows it to unconstitutionally discriminate against out-of-state residents in granting privileges to use wildlife. Neither in those cases nor in any other case has the United States Supreme Court ever held that those who under state law hold property rights in wildlife could not assert those property rights against private parties who wantonly destroy wildlife. Nor is this a case where the people's ownership of wildlife is being asserted to evade compliance with overriding federal law.

Defendants' reliance on the filed rate doctrine as a defense against restoring the revenues they have acquired by means of their acts of unfair competition is equally unavailing. The filed rate doctrine is a doctrine of federal law that applies only to claims against regulated public utilities that challenge rates authorized by the tariffs that they file with federal regulatory agencies. *Spielholz v. Superior Court*, 86 Cal.App.4th 1366, 1377 (2001). Defendants are not public utilities regulated by the state Public Utilities Commission and do not file tariffs with the Federal Energy Regulatory Commission.

Finally, defendants' California Energy Commission subsidies came not from the State Treasury General Fund but came from usage-based payments made by electricity consumers into a Renewable Resource Trust Fund administered for their benefit by the Commission "acting in . . . a fiduciary capacity." Stats. 1997, ch. 905, § 1(b); Pub. Utilities Code former §§ 381, 383.5, 445. Thus, these funds acquired from consumers by means of defendants' illegal acts are also subject to restitution.

representative actions had long been recognized in equity. In particular, actions by voluntary associations were a well-established form of representative action: "Mr. Justice Story, in his valuable treatise on Equity Pleadings . . . arranges the exceptions to the general rule [of complete joinder of parties], as follows: 1. Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole. 2. *Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole*; and 3. Where the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court." *Smith v. Swormstedt*, 57 U.S. 288, 302 (1854) (emphasis added); *accord*, *Von Schmidt v. Huntington*, 1 Cal. 55, 66-67 (1850) (citing Justice Story).

Section 382 codified this equity tradition. "The propriety of representative or class suits has long been recognized in our statutory law as embraced in section 382 . . . . [T]his statute is based upon the doctrine of virtual representation, which, as an exception to the general rule of compulsory joinder of all interested parties, 'rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice.' Even before the cited statute, as plaintiffs note, this doctrine found expression in this state . . . . [T]he cited statute . . . thus reenacts the long-prevailing equity rule . . . ." *Weaver v. Pasadena Tournament of Roses Assoc.*, 32 Cal.2d 833, 836-837 (1948) (citations omitted); *see also Bowles v. Superior Court*, 44 Cal.2d 574, 587 (1955); *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church*, 39 Cal.2d 121, 139-40 (1952); *Jellen v. O'Brien*, 89 Cal.App. 505, 509 (1928). Proposition 64 could have limited representative actions to only class actions by expressly using the words "class action." It did not, and instead only requires that a representative claim "compl[y] with Code of Civil Procedure Section 382," a criterion that embraces associational standing.

### C. Even Apart From Section 17200, CBD and Mr. Galvin Have Direct Standing To Enforce The Public Trust In Wildlife

The Supreme Court has held that every citizen of California has direct standing to bring an action to enforce the public trust in California's natural resources, and that organizations have associational standing to represent their members' interest in direct enforcement of the public trust.

*National Audubon Society v. Superior Court*, 33 Cal.3d at 431 n.11 ("any member of the general public has standing to raise a claim of harm to the public trust;" National Audubon Society had standing to raise public trust claims of its members). Thus, separate from any section 17200 claim, the complaint can also be amended to state a direct cause of action for enforcement of the public trust in the wildlife that defendants are killing.

## CONCLUSION

The demurrer of defendants should be overruled.

Respectfully submitted,

DATED: February 7, 2005

Richard R. Wiebe

Attorney for Plaintiffs
Center for Biological Diversity, Inc. and
Peter Galvin

## CERTIFICATE OF SERVICE

I am over the age of 18 years, a member of the State Bar of California, and not a party to this action. My business address is 425 California Street, Suite 2025, San Francisco, California, 94104, which is located in the county where the service described below took place.

On February 7, 2005, I served true and correct copies of the following document:

**Plaintiff's Opposition to Defendants' Demurrer**

by placing copies in sealed envelopes, addressed as shown below, and tendering them to an employee of Federal Express Corporation (FedEx), with delivery fees provided for, for overnight delivery:

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

Dated: February 7, 2005

Richard R. Wiebe