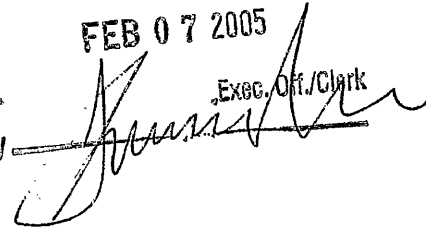




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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9 COUNTY OF ALAMEDA

11 CENTER FOR BIOLOGICAL DIVERSITY, INC.;
 12 PETER GALVIN,

Case No. RG 04 183113

13 Plaintiffs,

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

14 v.

COMPLEX CASE

15 FPL GROUP, INC.;
 16 FPL ENERGY, LLC;
 17 ESI BAY AREA GP, INC.;
 18 ESI BAY AREA, INC.;
 19 GREP BAY AREA HOLDINGS, LLC;
 20 GREEN RIDGE POWER LLC;
 21 ALTAMONT POWER LLC;
 22 ENXCO, INC.;
 SEAWEST WINDPOWER, INC.;
 23 PACIFIC WINDS, INC.;
 24 WINDWORKS, INC.;
 25 ALTAMONT WINDS, INC.,

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

26 Defendants.

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

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

5 NATURE OF THE CASE

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

12 In 1984, the first reports came in that the turbines were killing raptors. Notable scientific
13 studies and reports were published in 1991, 1992, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001,
14 2002, and 2003. The latest study, published by the California Energy Commission in August 2004,
15 shows that Altamont Pass wind turbines are currently killing from 880 to 1300 eagles, hawks,
16 falcons, and owls each year, including between 75 and 116 Golden Eagles annually.

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

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

1
2 **ARGUMENT**

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

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

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

22 Unlike a private representative action, a public prosecutor UCL action is not brought on
23 behalf of injured persons but "in the name of the people." Bus. & Prof. Code § 17204. It "is
24 fundamentally a law enforcement action designed to protect the public and not to benefit private
25 parties." *People v. Pacific Land Research Co.*, 20 Cal.3d 10, 17 (1977); *Payne v. National*
26 *Collection Systems, Inc.*, 91 Cal.App.4th 1037, 1045 (2001) ("An action brought pursuant to . . .
27 section 17200 et seq. by a prosecutor is fundamentally different from a class action *or other*
28 *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

1 enforcement action”). Any individual restitution or benefit to those who have been injured is
2 purely incidental, and prosecutors are free to sacrifice the interests of injured persons in their
3 pursuit of what they believe to be the public interest. *Pacific Land*, 20 Cal.3d at 17-18 & n.6
4 (p. 17, restitution “is not the primary object of the suit, as it is in most private class actions”; p. 18,
5 the prosecutor’s “role as a protector of the public may be inconsistent with the welfare of the
6 [injured persons] so that he could not adequately protect their interests”); *Payne*, 91 Cal.App.4th at
7 1045-47. The People as sovereign have no right to restitution; their monetary remedy is the civil
8 penalty authorized by section 17206 in an action “brought in the name of the people.”

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

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

1 163, 172 (2000) (rejecting argument that “an award of restitution to *persons who are not parties to*
2 *the action* in a representative UCL action by a private individual is constitutionally impermissible
3 unless the action is certified as a class action” (emphasis added)). Thus, a plaintiff who had
4 standing because of her own injuries could bring an action on behalf of her own interest but could
5 seek relief for all who lost money or property.

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

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

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

21 **II. Proposition 64 May Only Be Applied Prospectively**

22 **A. A New Statute Only Applies Prospectively Unless It Clearly,** 23 **Unambiguously, And Inescapably Manifests Its Retroactive Intent**

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

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

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

17 Thus, under this unusually firm rule of statutory construction, a statute is retroactive only if
18 the enacting body intends that it be retroactive *and* expresses that intent either in an express
19 retroactivity provision or in an equally clear, unambiguous, and inescapable statement of
20 retroactive intent: “California courts comply with the legal principle that unless there is an
21 ‘express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear*
22 from extrinsic sources that the Legislature . . . must have intended a retroactive application.’ ”
23 *Myers*, 28 Cal.4th at 841 (emphasis original), 844 (“a statute may be applied retroactively only if it
24

25
26 ¹ Nor is there any merit to defendants’ assertion that the rule against retroactivity applies only to
27 statutes modifying common law causes of action (Def’s. Mem. at 8 n.11). The Supreme Court has
28 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).

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

3 In the absence of an express retroactivity provision, there must be an “unequivocal and
4 inflexible statement of retroactivity.” *Myers*, 28 Cal.4th at 843. Any lesser expression of
5 retroactive intent is insufficient to make the statute retroactive: “[A] statute that is ambiguous
6 with respect to retroactive application is construed . . . to be unambiguously prospective.” *Myers*,
7 28 Cal.4th at 841; *see also ibid.* (“retroactive effect [is] adequately authorized by a statute only
8 when statutory language [is] so clear that it could sustain only one interpretation” (internal
9 quotation marks omitted)).

10 Here, Proposition 64 lacks any express retroactivity provision. As was true of Proposition
11 51 in *Evangelatos* is equally true of Proposition 64: “The drafters of the initiative measure in
12 question, although presumably aware of this familiar legal precept, did not include any language in
13 the initiative indicating that the measure was to apply retroactively to causes of action that had
14 already accrued and there is nothing to suggest that the electorate considered the issue of
15 retroactivity at all.” *Evangelatos*, 44 Cal.3d at 1194; *see also id.* at 1211 (“the drafters of
16 Proposition 51, in omitting any provision with regard to retroactivity, must have recognized that
17 the statute would not be applied retroactively”), 1212-13 (“[T]here is no reason to believe that the
18 electorate harbored any specific thoughts or intent with respect to the retroactivity issue at all.
19 Because past cases have long made it clear that initiative measures are subject to the ordinary rules
20 and canons of statutory construction, informed members of the electorate who happened to
21 consider the retroactivity issue would presumably have concluded that the measure—like other
22 statutes—would be applied prospectively because no express provision for retroactive application
23 was included in the proposition.” (citations omitted)).²

24 Nothing in the language of Proposition 64 even suggests that it might be applied
25 retroactively, much less clearly, unambiguously, and inescapably mandates that conclusion. To
26 the contrary, in its declarations of purpose the statute states that “It is the intent of the California
27

28 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.

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

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

15 Nor does the Court’s characterization of the People as the real party in interest in “general
16 public” UCL actions overcome this glaring absence of retroactive intent. Even under the Court’s
17 analysis, the question is whether it is certain that the electorate intended to put at risk meritorious
18 UCL actions being pursued by private individuals on its behalf or on behalf of injured nonparties
19 by suddenly dumping hundreds of UCL cases into the laps of unprepared and overworked state
20 and county prosecutors who would have only a brief time to decide whether, whatever the merits
21 of the claim, they have the resources in time and money to pursue it. Such a course will inevitably
22 result in the dismissal of many meritorious actions, especially in light of the state and local budget
23 crises. And in the case of lawsuits involving losses to injured nonparties, many persons will lose
24 forever any remedy, whether because of the statute of limitations or because individual actions are
25 economically infeasible. *Kraus*, 23 Cal.4th at 126. It is far more probable that the electorate
26 would have intended an orderly transition by establishing Proposition 64 as the structure for the
27 future, but allowing cases filed before the election to proceed as they otherwise would have.
28

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

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

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

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

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

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

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

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

