I. INTRODUCTION

On April 1, 2004, Plaintiff and Appellant Californians for Disability Rights ("CDR") filed its Notice of Appeal from the judgment of the trial court following a three week bench trial in 2003 in favor of Defendant and Respondent Mervyn's California, Inc. ("Mervyn's"). In the court below, CDR proceeded to trial on a single cause of action under California's Unfair Competition Law, Business and Professions Code §§ 17200, *et seq.* (hereafter "§ 17200" or "UCL"). On November 8, 2004, CDR filed its Opening Brief in this Court.

Now Mervyn's seeks to dismiss the appeal solely on the basis of the passage of Proposition 64 on November 2, 2004. Mervyn's, however, cannot use Proposition 64 to avoid appellate review in this action. Under well-established California law, applying Proposition 64 to this case would result in impermissibly and retroactively depriving CDR of its right to pursue this appeal. Proposition 64 cannot be read to repeal CDR's right of action under the UCL.

"Generally, statutes operate prospectively only." (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840.) This is so because retroactive application implicates constitutional concerns:

> In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions. It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation.... The Fifth Amendment's Takings Clause, and the Due Process Clause also protect the interests in fair notice and repose that may be

compromised by retroactive legislation; a justification sufficient to validate a statute's *prospective* application under the Due Process Clause 'may not suffice' to warrant its *retroactive* application.

(*Id.* at 841, *quoting Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265-266 (italics added by the *Myers* Court).) Accordingly, 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, supra,* 28 Cal.4th at 841, *quoting Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209 (italics added by *Myers* Court).) This important legal principle, codified in Civil Code § 3, applies with equal force to California voter initiatives that modify statutes. (*Evangelatos, supra,* 44 Cal.3d at 1193-1194.)

Mervyn's contention that Proposition 64's changes to the UCL merely create new "procedural" rules that do not result in impermissible retroactive application is without merit. If a statute creates a new procedure that alters substantive rights, it cannot be applied retroactively absent explicit legislative or voter intent. (*Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 815-17, *citing Aetna Cas. & Sur. Co. v. Indus. Accident Comm'n* (1947) 30 Cal.2d 388, 394-95.) Even a seemingly "procedural" amendment can affect substantive rights in an impermissible manner, particularly where such an amendment seeks to affect a case, such as this one, where a trial on the merits has already occurred. (*Aetna, supra,* 30 Cal.2d at 394; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.)

Proposition 64 adds to the UCL (1) a provision limiting standing to file a representative private suit to enforce § 17200 to "any person who has

suffered injury in fact and has lost money or property as a result of such unfair competition" (Text of Proposition 64, § 3, Declaration of Monique Olivier, Exhibit A, emphasis added); and (2) a provision that a private suit for "representative claims or relief on behalf of others" must meet the requirements of the class action statute, Code of Civil Procedure § 382 (*Id.*, § 2). These two requirements are written in the conjunctive. (*Cf. Stop Youth Addition v. Lucky Stores* (1998) 17 Cal.4th. 553, 561 (previous standing requirements of the UCL were broadly written in the disjunctive).)

These changes would eviscerate CDR's right to pursue a cause of action and obtain relief where that right was previously explicitly authorized. This is plainly a direct impact upon substantive rights. Yet, no provision of Proposition 64 informed voters that it was intended in any way to be applied retroactively. (Text of Prop. 64, Olivier Decl., Ex. A.) Nor is there evidence from the ballot materials that California voters intended Proposition 64 to apply to pending cases. (Voter Information, Olivier Decl., Ex. B.) It would be constitutionally impermissible, therefore, to apply the amendments to § 17200 retroactively.

Moreover, Proposition 64 does not repeal unfair competition claims like CDR's claim against Mervyn's. Mervyn's reliance on the "repeal rule" from a series of older Supreme Court cases is misplaced. Those cases – which pre-date *Evangelatos* and its progeny – state that "a cause of action or remedy dependent on a statute falls with a repeal of the statute." (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 829 (citation omitted).) Proposition 64, however, does not repeal a cause of action or remedy. To the contrary, the initiative preserves claims for "unlawful, unfair and fraudulent business practices" and maintains the remedies available for

violations of § 17200. (Prop. 64, § 1(a), Olivier Decl., Ex. A.) Moreover, as even Mervyn's acknowledges, the repeal rule does not apply where the cause of action was known at common law, which is the case with the UCL.

In addition, retroactive application of Proposition 64 is improper in this case because CDR's appeal raises important questions of first impression regarding the scope of both the Unruh Act (Civ. Code, § 51, *et seq*.) and the Disabled Persons Act (Civ. Code, § 54, *et seq*.). CDR, a nonprofit disability resource organization, brought this action to redress Mervyn's systematic and unlawful failure to provide full and equal access for customers with mobility disabilities to its merchandise. Following a trial, the court below made key factual findings in CDR's favor, including that Mervyn's has no minimum spacing requirements for the pathways between moveable display racks; that it does not measure the pathways or know how wide they are; and that Mervyn's has a discriminatory policy or practice of maintaining narrow pathways that prevent or impede access for persons with mobility disabilities to the merchandise at its stores. (AA 543, 553, 571.) Rather than order appropriate injunctive relief, however, the trial court erroneously allowed Mervyn's to take advantage of affirmative defenses available under the Americans with Disabilities Act, 42 U.S.C. §§ 12182, *et seq*. (the "ADA"), but not afforded under state law, and then misconstrued and misapplied those defenses. In so doing, the court erred as a matter of law.

CDR is entitled to appellate review. If CDR is successful on appeal, it will be entitled to a judgment in its favor or, at a minimum, a new trial on the merits affecting the rights of all Mervyn's disabled customers. Applying Proposition 64 retroactively would eliminate CDR's

substantive right to prosecute its action against Mervyn's. Further, CDR would be doubly penalized by the trial court's error that led to a judgment against CDR. It would, in effect, prove the adage that justice delayed is justice denied.

Mervyn's motion to dismiss on the basis of Proposition 64 is an unwarranted attempt to stop this Court from considering and resolving the serious legal errors that occurred in the court below. The Court should deny the motion.

II. ARGUMENT

A. Where Clear Voter Intent Is Absent, a Newly Enacted Initiative Statute Like Proposition 64 Applies Prospectively, and Cannot Apply Retroactively to Pending Cases.

Had Proposition 64's drafters intended to have their measure applied retroactively, they need only have inserted express retroactivity language. That they did not means that the measure lacks the "clear legislative intent" required to apply it retroactively. (*Evangelatos, supra,* 44 Cal.3d at 1193-94; *Russell, supra,* 185 Cal.App.3d at 818 ("The failure to include an express provision for retroactivity is, in and of itself, 'highly persuasive' of a lack of intent in light of [the presumption against retroactivity]").)

The interpretation of legislation presents a question of law. (*Borden v. Div. of Med. Quality* (1994) 30 Cal.App.4th 874, 879.) In interpreting an initiative, courts apply the same principles that govern statutory construction. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.) Those principles require resorting first to the language of the statute, and

second to its context, the statutory scheme and the ballot materials. (*Id.* at 901.) The goal is to determine and effectuate the intent of the voters. (*Ibid*.)

In reviewing an earlier initiative, the Supreme Court in *Evangelatos* set out the principles applicable here. Holding that Proposition 51, which eliminated joint and several liability for tort defendants, applied prospectively, the Court relied on the "widely recognized legal principle, specifically embodied in § 3 of the Civil Code, that in the absence of a clear legislative intent to the contrary statutory enactments apply prospectively." (*Evangelatos, supra*, 44 Cal.3d at 1193-94; *Myers, supra*, 28 Cal.4th at 841.) The Court emphasized that "[t]he 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 ...." (*Evangelatos, supra*, 44 Cal.3d at 1194.) The Court added that "there is nothing to suggest that the electorate considered the issue of retroactivity at all." (*Ibid.*) Accordingly, the Court refused to give the measure retroactive effect. (*Ibid.*)

Similarly, in *Myers v. Phillip Morris Companies, supra*, the Court rejected the argument that the Legislature's repeal of a statute that gave tobacco companies immunity from suit should operate retroactively to revive claims that accrued during the time the statute was in effect. The Court relied heavily on *Evangelatos*, stating that "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, *quoting Evangelatos, supra*, 44 Cal.3d at 1209 (italics supplied by the *Myers* Court).) Even in light of evidence that the Legislature had unequivocally repealed a statute and that it may have

intended to make that repeal retroactive, the Court found that the statute "is, at best, ambiguous on the question of retroactivity . . . . This ambiguity requires us to construe the repeal statute as "unambiguously prospective." (*Id*. at 843.)[1]

Most recently, in *McClung v. Employment Development Department* (Nov. 4, 2004, S121568) 2004 Cal. LEXIS 10527), the Supreme Court refused to give retroactive effect to an amendment to the Fair Employment and Housing Act that imposes personal liability for harassment on non-supervisory workers. Citing *Evangelatos,* the Court explained: "[I]t has long been established that 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.'" (*Id.* at p.*15, quoting *United States v. Heth* (1806) 7 U.S. 399, 413; also see *Bates v. Franchise Tax Bd* (Nov. 23, 2004, B169940) 2004 Cal.App. LEXIS 1986, at pp. *13-*14 (holding statute prospective in application).)

Evangelatos and its progeny control here. Nothing in Proposition 64 indicates any legislative intent, much less a clear one, that the measure was intended to apply to cases already under way. Indeed, the text of Proposition 64's findings suggests the measure was intended to prevent future actions from being filed, not to terminate pending cases. Section 1(e) of the measure provides: "It is the intent of the California voters ... to prohibit private attorneys from ***filing*** lawsuits for unfair competition where

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[1] Accordingly, Mervyn's citation to *Kuykendall v. State Bd. of Equalization* (1994) 22 Cal.App.4th 1194 is inapposite. There, the Court of Appeal found that the legislation at issue was expressly intended to apply retroactively to all pending cases. *Id.* at 209.

they have no client who has been injured in fact under the standing requirements of the United States Constitution." (Prop. 64 § 1(e), emphasis added.)[2]

In addition, neither the Attorney General's title and summary nor the Legislative Analyst's fiscal analysis advised voters that the measure would apply to pending cases. (Voter Information Materials, Olivier Decl., Ex. B.) In fact, consistent with the measure's findings, the Legislative Analyst explained that Proposition 64 "prohibits any person, other than the Attorney General and local public prosecutors, from ***bringing*** a lawsuit for unfair competition unless the person has suffered injury and lost money or property." (*Id.*, emphasis added.) The proponents' ballot arguments also emphasized Proposition 64 would "[a]llow[] only the Attorney General, district attorneys, and other public officials to ***file*** lawsuits on behalf of the People of the State of California ...." (*Id.*, emphasis added.)

Moreover, the Supreme Court's reasoning in these cases plainly applies here. Important in *Evangelatos* was the fact that all parties had acted in reliance on the existing law in making litigation choices. (*Evangelatos*, *supra*, 44 Cal.3d at 1215-17.) To the Court, it would have been unfair to change "the rules of the game" in the middle of the contest by applying new law to pending cases absent explicit notice in the legislation. (*Id.* at 1194.)

This is the case here. Californians who suffered actual injury due to Mervyn's unlawful conduct, for example, may well have relied to their

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[2]Indeed, this statement would be misleading if voters were intended to learn that Proposition 64 would impact pending UCL actions.

detriment on the representative suit filed by CDR. Had such injured persons known that Proposition 64 could be applied retroactively to pending cases, they might have timely intervened, but may now be barred by the statute of limitations or by the important fact that judgment has been entered.

Further, constitutional concerns bar retroactive application absent unambiguous intent to the contrary. (*Myers*, *supra,* at 846.) CDR's right to sue is far from inchoate. CDR filed a complaint, prosecuted it to judgment and is pursuing its right to appeal. Prospective application is therefore presumed and retroactive application is barred unless there is an express intent to the contrary. (*Myers*, 28 Cal.4th at 840-41.) Thus, retroactive application of Proposition 64 to deprive CDR of a cause of action litigated to judgment would raise serious constitutional issues that prospective application avoids.

Giving retroactive effect to Proposition 64 would have other far reaching substantive repercussions that voters never intended. Until the passage of Proposition 64, state and local prosecutors depended heavily on private enforcement actions brought by groups like the Sierra Club and the Consumers Union. (*See e.g., Stop Youth Addiction, supra,* 17 Cal.4th at 566 n. 6; *See also Kraus v. Trinity Management Service, Inc* (2000) 23 Cal.4th 116, 147-148 (Werdegar conc. and dis. opn.).) Calling an abrupt halt to such cases would require prosecutors who had abstained from suing to decide between filing suit or allowing unlawful conduct to go unchallenged, which impacts the obvious constraints on state and local officials whose resources are limited.

As the Legislative Analyst's Analysis makes clear, "this measure could result in increased workload and costs to the Attorney General and

local public prosecutors to the extent that they pursue certain unfair competition cases that other persons are precluded from bringing under this measure." (Olivier Decl., Ex. B.) The voters did not intend this result to occur overnight. Instead, they intended to give prosecutors and class representatives time to transition to the new statute by making it apply prospectively only. Any other interpretation would cut off current private enforcement efforts in ways the voters did not intend and the law does not explicitly allow.

B. Mervyn's Cannot Avoid the Rule Against Retroactivity by Claiming that Proposition 64 Is Merely Procedural; Application of the Amendments to the UCL to This Case Carries Significant Substantive Legal Consequences.

Mervyn's erroneously argues that Proposition 64's amendments are purely procedural and therefore do not result in impermissible retroactive application. The amendments, however, affect the substantive rights of CDR and have significant legal consequences. This is particularly the case given that a trial has already occurred and judgment has been entered. Retroactive application, therefore, is impermissible.

Both "procedural" and "substantive" statutes are subject to the general rule against retroactivity. (*Russell, supra*, 185 Cal.App.3d at 815, *citing Aetna, supra*, 30 Cal.2d at 394-95.) If a procedural amendment is applied in a later trial, the rule is *not* retroactive:

> Both types of statutes may affect past transactions and be governed by the presumption against retroactivity. The only exception we can discern from the cases is a subcategory of procedural statutes which can have no effect on substantive rights and liabilities, but

> which affect only modes of procedure to be followed *in future proceedings.* As *Aetna* pointed out, such statutes are not governed by the retroactivity presumption because they are procedural, but because they are not in fact retroactive.

(*Id*. at 816, emphasis added; *Aetna*, *supra*, 30 Cal.2d at 394 ("procedural statutes may become operative only when and if the procedure or remedy is invoked, and *if the trial postdates the enactment*," the statute is construed to operate prospectively rather than retrospectively).)

The California Supreme Court has rejected any bright-line distinction between purely "procedural" and purely "substantive" legislation. (*Aetna*, *supra*, 30 Cal.2d at 394-95.) Rather, "the distinction relates not so much to the form of the statute as to its effects." (*Id.* at 394.) The United States Supreme Court has likewise stated that "the mere fact that a new rule is procedural does not mean that it applies to every pending case." (*Landgraf , supra,* 511 U.S. at 275 n.29.) If substantive changes are made, "even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in the future unless the legislative intent to the contrary clearly appears." (*Aetna*, *supra*, 30 Cal.2d at 394.)

1. Proposition 64 "Procedures" Cannot Be Applied Retroactively to a Trial Occurring Before Its Enactment.

Mervyn's contention that Proposition 64's changes to the UCL are merely procedural are particularly inapplicable in this case, since a trial has already occurred and judgement has been entered. Amendments that

are "procedural" may be applied only to trials commencing after the amendments, not retroactively to trials that have been completed. Here, the trial and judgment long predated the effective date of Proposition 64.

In *Tapia v. Superior Court, supra,* a case upon which Mervyn's heavily relies (Mervyn's Mot. at 13-16), the Supreme Court considered the application of provisions of Proposition 115 to a criminal trial that postdated its enactment. The defendant argued that by applying the initiative's provision limiting the conduct of voir dire to the court, the Superior Court had applied the provision retroactively. The Court disagreed, stating: "Tapia's proposed test [of retroactivity] is not appropriate for laws which address *the conduct of trials which have yet to take place*, rather than criminal behavior that has already taken place. Even though applied to the prosecution of a crime committed before the law's effective date, a law addressing the conduct of trials still addresses conduct in the future." (53 Cal.3d at 288, emphasis added.) The Court, therefore, held that it could be applied to pending cases. (*Id.* at 289.)

Key to the ruling in *Tapia* was the fact that the new provision affected only the conduct of a trial that had yet to occur. (*Tapia, supra*, 53 Cal.3d at 299.) The Court, however, has not applied a procedural amendment that became effective during an appeal retroactively to a case that had already been tried. Just yesterday, the California Supreme Court ruled unanimously in *Elsner v. Uveges* (2004) ___ Cal.4th. ___; 2004 WL 2924303 that "[n]ew statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise," Slip 01 at 20 citing *Tapia, Evangelatos,* and *Aetna Cas. & Sur. Co.* "However, this rule 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 effect only future conduct – the future conduct of the trial." (*Id;* emphasis in original; citation omitted.)

This rule is directly analogous to the situation with respect to Proposition 64 in this case. The Court emphasised in *Elsner* that "to allow a jury in 2001 to decide whether Uveges had breached his duty of care in 1998 by considering Cal-OSHA provisions not previously admissible would be "to apply the new of law of today to the conduct of yesterday," (*Fox v. Alexis* (1985) 38 Cal.3d 621, 626, *quoting Pitts v. Perluss* (1962) 58 Cal.2d 824, 836.)" (*Elsner,* Slip 01 at 23 (footnote omitted).)

The cases Mervyn's cites only applied procedural amendments to cases that had not yet been tried as of the date of the amendment. For example, Mervyn's relies on *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120 and *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, cases in which the Courts of Appeal retroactively applied procedural amendments to California's anti-SLAPP statute. While the cases were pending on appeal, the Legislature enacted Code of Civil Procedure § 425.17, which limited the application of the anti-SLAPP statute. In both cases, the courts observed that the anti-SLAPP statute is a procedural "screening device" applied at the outset of the case to prevent the chilling of First Amendment rights, and therefore applied the procedural amendment rule to determine the appeals before them. Because the cases were in their infancies, the courts found it appropriate to apply the new procedure to make a threshold determination.

Unlike § 425.17, Proposition 64 does not address a threshold

procedural issue. Therefore, they lend no authority to the application of Proposition 64 to this case, which has been fully tried and is pending on appeal.

2. Standing To Sue Is a Substantive Requirement.

In addition to the fact that application of Proposition 64 cannot be read as merely procedural given the posture of the case, the new standing provisions enacted by Proposition 64 cause a substantive change and for this reason alone cannot be applied retroactively. Standing is a matter of substance because it affects the right of a party to sue. (4 Witkin, Cal. Proc. (4th ed. 1997) Pleading, § 104, p. 162.) "The person who has the right to sue under the substantive law is the real party in interest; the inquiry, therefore, while superficially concerned with procedural rules, really calls for a consideration of rights and obligations." (*Id.*)

The example given by the United States Supreme Court fits Proposition 64: "A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime ...." (*Landgraf, supra*, 511 U.S. at 265-266.) Proposition 64 deprives concerned citizens and public interest groups of the right to file unfair competition complaints under § 17200 and obtain equitable relief for affected members of the public. As such, it is clearly a change that impacts substantive rights.

Likewise, if standing is viewed as jurisdictional, it is no less substantive. The United States Supreme Court has explained that there are two types of "jurisdictional" statutes. Statutes that "simply change[] the tribunal that is to hear the case" can be applied to pending cases, but statutes that change "the rights and obligations of the parties" are

substantive and cannot be applied retroactively absent express provision. (*Hughes Aircraft Co. v. United States ex. rel. Schumer* (1997) 520 U.S. 939, 951.) In *Hughes*, the Court recognized that a jurisdictional statute that affects "*whether*" a suit "may be brought at all" as opposed to "*where*" it may be brought is substantive and cannot be applied retroactively. (*Ibid.*, emphasis in original.) The standing provisions of Proposition 64 plainly implicate the former and cannot be applied retroactively.

3. The Class Action Requirement Creates Substantive Consequences.

Proposition 64's additional requirement that all private § 17200 actions comply with the requirements of the class action statute is also a substantive change in the law. (Prop. 64, § 2, Olivier Decl., Ex. A.) Class certification carries significant substantive consequences for the parties that preclude retroactive application.

First, the provisions of § 382 are substantive and not procedural. Any voter reading that section – which states that one or more individuals may sue for the benefit of all "when the question is one of a common or general interest" – would so conclude. This provision has been interpreted by the California Supreme Court to require a number of substantive requirements: (1) "an ascertainable class;" and (2) "a well-defined community of interest among the class members." *Save-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435. The "community of interest requirement," in turn, "embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the

class." *Sav-on, supra,* 34 Cal.4th at 326.

The fact that common issues must predominate over individual ones before a class may be certified under this provision necessarily means that a number of categories of cases cannot result in class certification. These include personal injury cases, generally cases involving toxic torts and toxic releases and many product liability cases in which personal injuries are at issue. See e.g. *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1107-1108; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1009 (medical monitoring); *Quacchia v. Daimler Chrysler Corp.* (2004) Cal.App.4th 1442, 1453 (defective seatbelt buckles). Thus, § 382 and its judicial interpretation create substantive barriers to class certification, a prerequisite for standing and obtaining any relief under the UCL as amended by Proposition 64.

Second, filing a class action serves to toll the statute of limitations for the entire class; there is no such tolling in a non-class representative action under § 17200. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1118-1124; see *American Pipe & Constr. Co. v. Utah* (1974) 414 U.S. 538, 552.) Third, in a class action, the court may order disgorgement of unlawful profits into a fluid recovery fund, but such a remedy is not available in a non-class § 17200 action. (*Kraus v. Trinity Management* (2000) 23 Cal.4th 116, 121, 124-37; accord, *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144-52.) Fourth, a class action judgment affords defendants res judicata effect binding all absent class members, while a judgment in a non-class § 17200 action does not. (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 808; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704-05.)

All of these features of class actions carry substantive consequences

which preclude retroactive application of Proposition 64. Again, this is particularly the case here, after a trial has been concluded and the case is pending on appeal.

C. Proposition 64 Does Not Fall Within the Line of Cases Regarding Retroactive Repeals Because It Did Not Repeal Private Actions Under Section 17200.

Mervyn's claims that Proposition 64 has repealed the UCL such that CDR is now deprived of its right to prosecute its appeal in this action. In support, it relies upon a line of older Supreme Court cases for the proposition that a cause of action dependent on a statute "falls with the repeal of the statute, even after the action thereon is pending, in the absence of a savings clause in the repealing statute." (Mervyn's Mot. at 7.) (See *Governing Board of Rialto Unified School Dist. V. Mann* (1977) 18 Cal.3d 819; *Younger v. Superior Court* (1978) 21 Cal.3d. 102.) Mervyn's reliance on these cases, and its argument that this technical rule should be woodenly applied to Proposition 64, are misplaced. As the language of Proposition 64 makes plain, it did not repeal the UCL. The Supreme Court has held that the intention of the voters is "paramount" in interpreting a ballot initiative. (*In re Lance W.* (1985) 37 Cal.3d 873, 889; *Evangelatos*, *supra*, 44 Cal.3d at 1209.) There is no hint in the language of the initiative or in any of the ballot materials that the voters intended to halt actions that were already pending. In addition, as Mervyn's acknowledges, the repeal rule does not apply in instances where there was a common law right to assert the claim at issue, as is the case here. (Mervyn's Mot. at 8.)

First, the text of Proposition 64 does not "repeal" the cause of

action for unfair competition provided by § 17200. The content of the § 17200 cause of action for "unlawful, unfair and fraudulent business practices" is unimpaired. (Prop. 64, § 1(a).) Instead, Proposition 64 adds substantive standing and class action requirements to the UCL.

Second, the unfair competition cause of action was not "unknown at common law." In 1933, former Civil Code § 3369, the predecessor to § 17200, codified the common law tort of unfair business competition between business competitors. (*See* Stern, *Bus. & Prof. Code § 17200 Practice* (The Rutter Group 2004) ¶¶ 2.01-2.11.) Subsequent court decisions expanded the scope of the common law rule codified in § 3369 from business competitors to consumers victimized by unfair business practices. (*People ex rel Mosk v. Nat'l Research Co.* (1962) 201 Cal.App.2d 765, 770-71.) While "the statutory definition of 'unfair competition' 'cannot be equated with the common law definition ....'" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264, citation omitted), this does not detract from the fact that the business tort now embodied in § 17200 is derived from the common law. The statute codified the common law and courts then extended the common law "protection once afforded only to business competitors" to the entire consuming public. (*Barquis v. Merchants Collection Ass'n* (1972) 7 Cal.3d 94, 109; accord, *Bank of the West, supra,* 2 Cal.4th at 1264.) Thus, the repeal rule, as Mervyn's acknowledges, is inapplicable to claims like § 17200 that exist "by virtue of a statute codifying the common law." (*Callet v. Alioto* (1930) 210 Cal. 65, 68.)

Third, the cases upon which Mervyn's relies provide it no support. In *International Ass. of Cleaning & Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, the entirety of the law at issue, unlike the case here, had been

repealed. (*Id.* at 423.) In *Governing Board of Rialto Unified School Dist. v. Mann, supra,* the Supreme Court gave retroactive effect to a statute prohibiting any public entity from revoking any right of an individual as a result of a conviction for possession of marijuana prior to the statute's passage, provided that two years had passed since the conviction. The Court explained that the Legislature's intent to repeal the school district's right to take disciplinary action based on an old conviction was clear from the statute itself, which the Court described as follows:

> That section provides, in broad and sweeping language, that no public agency, including a school district, shall impose any sanction upon an individual on the basis of a possession of marijuana arrest or conviction, or on the basis of the facts or events leading to such an arrest or conviction, "on or after the date the records of such an arrest or conviction are required to be destroyed, [footnote omitted] . . . 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."

(*Mann,* 18 Cal.3d at 827, emphasis omitted.)

By its own terms, then, the statute applied to convictions "occurring prior to January 1, 1976," and there could be no doubt that the Legislature intended to prevent the district from dismissing its employee on the basis of such a conviction. Thus, *Mann* implemented an explicit statement of legislative intent.

Close on the heels of *Mann,* the Court decided its only other modern case on retroactive repeals. In *Younger v. Superior Court, supra,* the Court gave retroactive effect to another part of the same legislation at

issue in *Mann*.[3] That statute replaced an earlier provision that had authorized the superior courts, on petition, to order the destruction of records of arrests or convictions for possession of marijuana prior to January 1, 1976. (*Younger*, *supra*, 21 Cal.3d at 107-108.) The new statute provided for destruction of those records by order of the Department of Justice upon application by the person affected. Citing the retroactive repeal rule, the Supreme Court ordered the superior court to vacate its destruction order because "the Legislature has revoked the statutory grant of jurisdiction for this proceeding, and has vested it in no other court." (*Id.* at 110.) The Court observed that "like all statutes," the new provision "is to be read with a view to effectuating legislative intent" and concluded that "we are satisfied the Legislature meant the statute to apply only to persons who have completed their punishment before seeking relief from the collateral effects of their convictions." (*Id.* at 113.)

Both *Mann* and *Younger*, therefore, can and should be squared with the Court's insistence in *Evangelatos* on evidence of legislative intent and with other cases dealing with prospective operation of statutes. In *Mann*, the statute contained an unambiguous expression of legislative intent to remove a public entity's right to take disciplinary actions based on marijuana convictions obtained more than two years prior to the statute's enactment. In *Younger*, the statute contained unambiguous evidence of legislative intent to divest the superior courts of jurisdiction to order destruction of marijuana arrest or conviction records.

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[3] *Mann* described the legislation as "an entirely new comprehensive statutory scheme to govern the treatment of marijuana offenses and offenders." (18 Cal.3d at 826.) *Mann* and *Younger* also involved a very different sphere of facts than that presented to this Court in Proposition 64. Both cases arose in the distinctive setting of public entitlements and addressed amendments to the Education Code.

Here, however, there is no evidence that the voters intended to stop pending cases by enacting Proposition 64. Notably, the voters did *not* narrow or eliminate the conduct that would give rise to a cause of action on behalf of the public under section 17200. If conduct that occurred prior to passage of the measure was actionable then, it remains actionable now, and the public's right to be protected from it remains unchanged. What Proposition 64 did was to narrow the type of future plaintiffs who can institute the action on behalf of themselves and the class they represent.

Moreover, perhaps the most instructive modern case on the retroactive repeal rule is one in which the Supreme Court did not mention the rule at all. As discussed above, in *Myers v. Philip Morris Companies, Inc., supra,* the California Supreme Court rejected the argument that the Legislature's repeal of a statute that gave tobacco companies immunity from suit should operate retroactively to revive claims that accrued during the time the statute was in effect. Despite the fact that it referred to the new statute as "the Repeal Statute" throughout its opinion, the Court never mentioned the retroactive repeal rule or any of the cases on which Mervyn's now relies. Instead, the Court relied on *Evangelatos* and held that "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, supra,* 28 Cal.4th at 841, citing *Evangelatos, supra,* 44 Cal.3d at 1209, emphasis in original.) In so doing, the Court effectively brought the old retroactive repeal rule into the *Evangelatos* doctrine, a much more manageable and definitive approach to statutory construction and one that is grounded in the cardinal rule that all canons of statutory construction are designed to ascertain only one thing: legislative intent. (*See Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724 ("We

begin with the fundamental rule that our primary task in construing a statute is to determine the Legislature's intent.").)

There is another important reason why the statutory repeal cases have no application here. Public rights are at stake in this case. Proposition 64 did not repeal those public rights; it reaffirmed them. In marked contrast, in the statutory repeal cases Mervyn's cites, the repeals affected purely private rights by completely eliminating those rights. Unlike the statutes in question in *Mann* and *Younger,* the UCL is designed to protect the public, not merely individuals. Injunctions obtained under the UCL are public, not private, remedies.

In *Broughton v. CIGNA HealthPlans of California, Inc.* (1999) 21 Cal.4th 1066, the Supreme Court held that a claim for injunctive relief under the Consumer Legal Remedies Act is not arbitrable because it is a public, not a purely private, remedy: "Whatever the individual motive of the party requesting injunctive relief, the benefits of granting injunctive relief, by and large, do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices that the plaintiff suffered.... In other words, the plaintiff in a CLRA damages action is playing the role of a private attorney general." (*Id*. at 1080.)

In *Cruz v. PacifiCare* (2003) 30 Cal.4th 303, 315, the Court reaffirmed and extended the *Broughton* inarbitrability rule to injunctions under the UCL. "In the present case, the request for injunctive relief is clearly for the benefit of health care consumers and the general public by seeking to enjoin PacifiCare's alleged deceptive advertising practices. The claim is virtually indistinguishable from the CLRA claim that was at issue in *Broughton*." (*Cruz, supra*, 30 Cal.4th at 315.)

Thus, the true "party in interest" in this case is not CDR, but its

members and the general public who have experienced lack of access to public accommodations that Mervyn's operates. Like the plaintiffs in *Broughton* and *Cruz,* here CDR acted as a private attorney general. The public is the actual beneficiary and party to this case.

In sum, none of the repeal cases provides a current, well-reasoned, or compelling precedent for determining the effect of a voter initiative of the magnitude of Proposition 64. To the extent that these cases might be thought to apply in this vastly different context, they are of extremely dubious vitality after *Evangelatos*. In the analysis mandated by the Supreme Court, substance, not form, is controlling. Actual voter intent is paramount; the Court may not simply presume that the electorate intended to apply Proposition 64 to this case in the absence of any evidence of intention to do so, and in the face of compelling evidence that they intended *not* to do so.

III. CONCLUSION

Retroactive application is especially inappropriate in a case like this in which trial and has been concluded and the case is pending on appeal. If Proposition 64 is applied retroactively, CDR will be denied its right to have this Court address the legal errors of the court below. In this context, the retroactive application of Proposition 64 clearly has a substantive effect on CDR's antecedent rights and therefore is unwarranted in the absence of an explicit statement of voter intent not present in Proposition 64.

For the foregoing reasons, this Court should deny Mervyn's motion to dismiss.

Dated: December 20, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1) of the California Rules of Court, Plaintiff and Appellant Californians for Disability Rights hereby certifies that the typeface in the attached brief is proportionally spaced, the type style is roman, the type size is 13 points or more and the word count for the portions subject to the restrictions of Rule 14(c)(3) is 6588.

Dated: December 21, 2004 THE STURDEVANT LAW FIRM

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