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FILED BY FAX

ALAMEDA COUNTY
February 07, 2005

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By Corinna Carden, Deputy
CASE NUMBER:
JCCP004332

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

Coordination Proceeding
Special Title (Rule 1550(b))

CELLPHONE TERMINATION FEE
CASES

JUDICIAL COUNCIL
COORDINATION PROCEEDING
NO. 4332

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

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS
BASED ON PROPOSITION 64

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS BASED ON PROP. 64
43547

1 Plaintiffs submit this supplemental memorandum of points and authorities in support of
2 their opposition to defendants' motions for judgment on the pleadings based on Proposition 64.¹

3 I. ARGUMENT

4 A. **The Court Must Deny Defendants' Motions Based on the First
5 District Court of Appeal's Recent Decision in *Californians for
6 Disability Rights v. Mervyn's, LLC***

7 In its January 28, 2005 tentative ruling, the Court invited the parties to submit supplemental
8 briefs. On February 1, 2005, the First District Court of Appeal issued a decision concerning
9 Proposition 64 in *Californians for Disability Rights v. Mervyn's, LLC*, Court of Appeal Case No.
A106199 (Feb. 1, 2005) (the "CDR case").

10 In the CDR case, plaintiff Californians for Disability Rights ("CDR") brought an action
11 under Business and Professions Code Section 17200 *et seq.* (the "UCL") claiming that defendant
12 Mervyn's had failed to provide an adequate pathway between merchandise displays in its retail
13 stores. Following a bench trial, the trial court denied relief to CDR and entered judgment in favor
14 of Mervyn's. CDR appealed. Following the passage of Proposition 64 on November 2, 2004,
15 Mervyn's moved to dismiss CDR's appeal based on the change in the UCL's standing
16 requirements. In a published opinion filed on February 1, 2005, the Court of Appeal denied
17 Mervyn's motion to dismiss and ruled that Proposition 64 is not retroactive and does not apply to
18 pending cases.

19 In its opinion, the Court of Appeal emphasized that a new or revised statute is "presumed to
20 operate prospectively absent an express declaration of retrospectivity or a clear indication that the
21 electorate, or the Legislature, intended otherwise." Slip Opinion at 3 (quoting *Tapia v. Superior
22 Court* (1991) 53 Cal.3d 282, 287). The court then noted that "Proposition 64 contains no express
23 declaration of retrospectivity" and that "the only fair conclusion is that the question of whether
24 Proposition 64 applies to pending lawsuits was not presented to, nor considered by, the electorate."
25 *Id.* at 3-4. The court also relied heavily on *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 in
26

27 ¹ Plaintiffs also hereby join in the supplemental brief submitted by plaintiff Foundation
28 Aiding the Elderly in *Foundation Aiding the Elderly v. Covenant Care California, Inc., et al.*,
Alameda County Superior Court Case No. RG03087211.

1 which the California Supreme Court held that Proposition 51 could not be applied retroactively
2 because of the lack of "any express provision directing retroactive application." 44 Cal.3d at
3 1209.²

4 The appellate court also rejected the defendant's argument that Proposition 64 could be
5 applied to pending cases because it merely established new procedural rules and would not affect
6 the substantive rights of the parties. The court declared that dismissal of the plaintiff's action
7 would "substantially affect" its rights and that "[a]pplication of Proposition 64 to cases filed before
8 the initiative's effective date would deny parties fair notice and defeat their reasonable reliance and
9 settled expectations." Slip Opinion at 8-9. The court concluded:

10 The disruption that would result from application of Proposition 64 to
11 preexisting lawsuits should not be minimized. Plaintiffs who filed and
12 prosecuted cases for years . . . could suffer dismissal of their lawsuit at all
13 stages of litigation. The prospect of such dismissals raises a host of difficult
14 questions, including whether a plaintiff who did not allege actual injury is
15 entitled to amend his or her complaint to make the allegation or substitute
16 another party who was injured; whether a plaintiff may amend his or her
17 complaint to add class action allegations; and whether any amended standing
18 allegations relate back to the filing of the complaint so as to toll the statute
19 of limitations. *Retroactive application of a statute often entails difficulties in
20 enforcement and unanticipated consequences, and should not be embarked
21 upon where, as here, there is no indication that retroactivity was ever
22 considered or intended by the voters.*

23 *Id.* at 9 (emphasis added).

24 The First District's decision in the *CDR* case is controlling and directly on point. There are
25 no legitimate grounds for distinguishing this case or otherwise preventing it from being applied to
26 the present action. *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455 (holding that a
27 court acts in excess of its jurisdiction when it refuses to follow the binding precedent of a higher
28 court). The Court must therefore deny defendants' motions.

29 / / /
30 / / /

31 ² The First District also held that the repeal of a statute does not displace the general principle
32 of prospectivity. In fact, the court held that the so-called "repeal" rule is not an exception to the
33 presumption of prospectivity, but rather an application of it. Slip Opinion at 7. The court
34 recognized that a repealed statute indicates "legislative intent that the repeal legislation apply
35 retroactively, thus rebutting the presumption of prospectivity." *Id.*

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B. Plaintiffs Dispute the Court's Conclusions in Its Tentative Ruling

The Court should dispose of defendants' motions based solely on the Court of Appeal's decision in the *CDR* case. Nevertheless, plaintiffs take issue with other conclusions in the Court's tentative ruling. For example, plaintiffs believe that the Court is incorrect in holding "that when private parties asserted UCL claims in the interest of the general public the real party in interest was the general public." Tentative Ruling at 8. Witkin states that "[t]he person who has the right to sue under the substantive law is the real party in interest." 4 Witkin, *California Procedure* (4th ed. 1997), "Pleading," § 104 at 162 (4th ed.). Similarly, in *Keru Investments, Inc. v. Cube Co.* (1998) 63 Cal.App.4th 1412, the Court of Appeal held that "the real party in interest is the party who has title to the cause of action, i.e., the one who has *the right to maintain the cause of action.* *Id.* at 1424 (emphasis added and citations and internal quotation marks omitted). Prior to the enactment of Proposition 64, Business and Professions Code Section 17204 ("Section 17204") provided that "any person" could bring an action to remedy "unlawful, unfair or fraudulent" business practices. Accordingly, the named plaintiffs in a representative action under the UCL possessed the right to sue under Section 17204 and were therefore the real party in interest, not the general public. In fact, the general public can never bring a lawsuit on its own behalf and would not be bound by a judgment rendered against a so-called "uninjured" plaintiff.³ See, e.g., *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 970 ("To be sure, if this matter ultimately does not proceed as a class action, the possibility that nonparties may pursue their own remedies poses a risk to [the defendant].").

Furthermore, the Court also stated that representative plaintiffs in a UCL action would not have been subjected to "unexpected and potentially unfair consequences" if they cannot pursue their claims on behalf of the general public. Tentative Ruling at 16 (quoting *Evangelatos, supra*,

³ In its tentative ruling, the Court cited Code of Civil Procedure Section 367 which states: "Every action must be prosecuted in the name of the real party in interest, except as provided in Section 369 and 374 of this code." The Court, however, did not acknowledge Code of Civil Procedure Section 369(a)(4) which creates an exception to Section 367 and provides that any person authorized by statute "may sue without joining as parties the persons for whose benefit the action is prosecuted." This further supports plaintiffs' contention that the named plaintiff in a representative action under the UCL is the real party in interest, not the general public.

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44 Cal.3d at 1217). The Court ignores, however, the significant time and expense incurred by the representative plaintiffs and their counsel in the prosecution of their claims. Moreover, the Court does not acknowledge the potential harm to the substantive rights of consumers injured by defendants' unfair business practices. Indeed, in some cases, defendants could entirely avoid liability by the termination of the claims against them. While it is possible that some claims could be revived by the intervention of injured parties or governmental entities, the potential liabilities in such a case would not be identical due to the running of the statute of limitations.

The Court also relies on the proposition that the attorney general or local public officials can intervene in the pending actions and prosecute those claims on behalf of the general public. Tentative Ruling at 13-15. Plaintiffs believe that such an expectation is highly unrealistic in light of the limited budgets and heavy workloads already facing these agencies. Moreover, the California Supreme Court has already recognized that private enforcement of the UCL plays an important role in the protection of consumer's rights. See, e.g., *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126; see also *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807-808.

II. CONCLUSION

For the reasons set forth above, plaintiffs respectfully request that the Court deny defendants' motions for judgment on the pleadings based on Proposition 64.

Dated: February 7, 2005

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Lisa Baker
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