

No. S 131798  
1st Civ. No. A106199

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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**CALIFORNIANS FOR DISABILITY RIGHTS,**  
*Plaintiff and Appellant,*

v.

**MERVYN'S LLC,**  
*Defendant and Respondent.*

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On Petition for Review After Denial Of a Motion to Dismiss by  
the Court of Appeal, First Appellate District, Division Four

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**MERVYN'S ANSWER TO APPELLANT'S PETITION FOR  
REHEARING OR MODIFICATION OF OPINION**

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Service on the Attorney General Required by  
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Cal. Rules of Court, Rules 15(c)(3), 44.5(c)

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**MERVYN'S ANSWER TO APPELLANT'S PETITION  
FOR REHEARING OR MODIFICATION OF OPINION**

**I. INTRODUCTION**

This Court determined that Proposition 64's requirement of injury in fact and a loss of money or property applied to this case. In *Branick v. Downey Savings and Loan Association* (July 24, 2006, S132433) 39 Cal. 4th 235, 2006 Cal. LEXIS 8775 ("*Branick*"), a companion case, this Court ruled that Proposition 64 does not affect the ordinary rules governing amendment of complaints and their relation back. (*Id.* at p. 4.) Now Appellant and Plaintiff Californians For Disability Rights ("CDR") petitions this Court for rehearing or modification of opinion, asking this Court to ignore these well-settled rules and to amend its opinion to order the Court of Appeal to allow CDR to seek "substitution" of plaintiffs under *Branick*.

This request is contrary to well-established law and inconsistent with the directions given by this Court in *Branick*. First, no plaintiff, including CDR, is entitled to amend a complaint – post-judgment – to add a new plaintiff. Second, substitution of parties would not cure the standing defect as the requirement of injury in fact and a loss of money or property was presented in the action. Finally, since CDR merely seeks injunctive relief, denying CDR leave to amend in this case would not affect the rights of anyone actually injured nor prevent a new plaintiff with standing from filing suit. For these reasons, Mervyn's, LLC ("Mervyn's") respectfully requests that this Court deny the petition for rehearing or modification and

reject the request to instruct the Court of Appeal to allow CDR to seek substitution of plaintiffs.

## II. ARGUMENT

### A. Well Established Law Prohibits Post-Judgment Amendments to Complaints

While a trial court has broad discretion to allow a party to amend its complaint, the authorization to allow amendments does not extend post-judgment. “Amendments proffered after judgment is rendered, however, are allowed only if the judgment is vacated as by granting a motion for new trial.” (*Young v. Berry Equip. Rentals, Inc.* (1976) 55 Cal.App.3d 35, 38; see also *Risco v. Reuss* (1941) 45 Cal.App.2d 243, 245; *King v. Unger* (1938) 25 Cal.App.2d 632, 635; *Issa v. Alzamar* (1995) 38 Cal.App.4th Supp. 1, 4; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 1139, p. 595.) Because CDR has no standing to pursue this claim, no basis exists for vacating the judgment. As such, neither the Court of Appeal nor the trial court could properly authorize an amendment to the complaint to add a new plaintiff.

This Court’s grant of review of *Branick* reflects a recognition of this long-standing rule. If the issue of amendment of pleadings had been an issue presented in this action, this Court would not have had to grant review in *Branick* to address issues of amendment. (*Branick v. Downey Savings and Loan Association* (2005) 110 P.3d 1217, April, 27, 2005, S132433.)

### B. Substitution of Parties Cannot Cure the Defect in CDR’s Claim

Perhaps recognizing the prohibition against post-judgment amendment to complaints, CDR phrases its request as a “substitution” of

parties, relying on rule 48, subdivision (a) of the California Rules of Court. This provision, however, is inapplicable. Rule 48, subdivision (a) only applies where a party dies or transfers his interest in an action while the appeal is pending. (*Hollaway v. Scripps Memorial Hospital* (1980) 111 Cal.App.3d 719, 724, fn. 1 [“The rule is based on case law which deals with routine substitutions of parties pending appeal, made necessary by an objective event ....”].) In this case, CDR has lost standing entirely, and thus has no interest to transfer.

CDR sued as “a private attorney general on behalf of the general public under [section] 17204.” (Compl., ¶ 8.) It sought declaratory and injunctive relief “on behalf of those members of the general public who are being harmed by defendant’s conduct.” (*Ibid.*) CDR did not claim that it had been subjected to or harmed by the alleged unlawful business practice, and it did not allege that it had lost money or property as a result of that practice. Nor did it seek or obtain class certification. Substituting in a new party to pursue CDR’s claims would not cure these limitations and failings.

Further, the addition of plaintiffs with standing would necessarily present new issues about the loss of money or property – issues the parties did not try in the action below. While CDR might be able to ferret out snippets of testimony suggesting the existence of such losses, those issues were not at issue in the trial below and cannot now be resolved *post hoc*.

Accordingly, CDR’s request is unsupported by law and this Court need not modify its opinion to allow CDR to make a baseless motion to “substitute” before the Court of Appeal.

**C. Since CDR Only Sought Injunctive Relief, Granting Leave to Amend in this Case Serves No Purpose**

Finally, denying CDR's request to sidestep existing rules of procedure to preserve the judgment for Mervyn's will not work any injustice. CDR sought only injunctive relief. It did not seek restitution or disgorgement. Thus, CDR did not advance any claim that the passage of time now bars.

As this Court recognized, as a result of the passage of Proposition 64 "nothing earlier forbidden is now permitted." (*CDR v. Mervyn's* (2006) 39 Cal. 4th 223, \_\_\_ [2006 Cal. LEXIS 8774 at p. 16].) Thus, denying CDR leave to amend would not affect or inhibit the rights of future plaintiffs who suffered the requisite injury. Since this case involves only a claim for injunctive relief brought by CDR in its representative capacity, future plaintiffs who can prove a loss of money or property could still pursue claims against Mervyn's.

**III. CONCLUSION**

For the reasons listed above, Mervyn's respectfully requests that the Court deny CDR's petition for rehearing or modification of opinion and reject the request to instruct the Court of Appeal to allow CDR to seek substitution of plaintiffs.

DATED: August 16, 2006

Respectfully submitted,

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By: DAVID F. McDOWELL

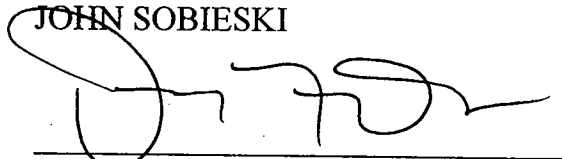
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Pursuant to Rule 14, subdivision (c)(1) of the California Rules of Court, Defendant and Respondent Mervyn's LLC hereby certifies that the typeface in the attached brief is proportionately spaced, the type style is Roman, the type size is 13 points or more, and the word count for the portions subject to the restrictions of Rule 14, subdivision (c)(3) is 979.

DATED: August 16, 2006

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'David F. McDowell', is written over a horizontal line. The signature is stylized and cursive.

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