SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CALIFORNIA LAW INSTITUTE, in a representative capacity, Plaintiff, vs. VISA USA, INC. a foreign corporation, et al., Defendants.	Case No.: CGC-03-421180 ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION AND JUDICIAL NOTICE

Defendants Visa USA, Inc. and MasterCard International, Inc. have moved for a judgment on the pleadings in this case. The basis for this motion is that Proposition 64, recently passed by the electorate, deprives plaintiff of standing to maintain this action.

Upon the request of the defendants, this court took judicial notice of 1) the text of Proposition 64 from the Official Voter Information Guide distributed by the California Secretary of State for the November 2, 2004 General Election [Declaration of Michael W. Scarborough in Support of Motion

of Defendants MasterCard International, Incorporated and Visa USA Inc. for Judgment on the Pleadings and Request for Judicial Notice, filed November 19, 2004 ("Scarborough Decl."), Ex. A]; 2) the fact that Proposition 64 was passed by California voters in the November 2, 2004 General Election [Scarborough Decl., Ex. B]; and 3) admissions of the plaintiff's counsel and discovery responses from the plaintiff confirming that the plaintiff is not an appropriate plaintiff under Proposition 64 to bring this action [Scarborough Decl., Ex. C-G].

Under California law, Proposition 64 became effective on November 3, 2004, the day after the General Election. Cal. Const. art. II § 10(a).

Upon these matters, it is clear that after the effective date of Proposition 64, plaintiff could not bring this action. The issue presented here is whether Proposition 64 applies to cases already on file as of its effective date so as to require that plaintiff's action be dismissed.

ANALYSIS

A new ballot proposition is presumed to operate prospectively unless there is either an express declaration of retrospectivity or a clear indication that the electorate intended otherwise. *Tapia v. Superior* Court (1991) 53 Cal.3d. 282, 287. In *Evangelatos v. Superior Court* (1988) 44 Cal. 3d. 1188, the Court held Proposition 51 [Civil Code §§ 1431 to 1431.5] not retroactive. Proposition 51 did not contain any language stating it would be retroactive, and the initiative measure material provided to the electorate likewise did not say anything about retroactivity. The court observed that there was thus nothing to indicate that the electorate considered the question of whether what they were voting on would be applied retroactively. Also, the court declined to imply a retroactive intent from the general

purpose and context of the enactment because to do so would substantially modify a legal doctrine which existing litigants may have relied upon in conducting their legal affairs prior to the new law. *Id.* at 1193-94.

Defendants assert that *Evangelatos* and similar cases do not apply here because the plaintiff's original claim was created by statute as opposed to arising from the common law. Defendants postulate that statutory rights are created by the legislature and thus can be taken away by the legislature, citing a litany of cases to that effect. None of these cases, however, supports that conclusion here.

Defendants rely on *Physicians Committee for Responsible Medicine v. Tyson Foods* (2004) 119 Cal.App.4th 120 for the proposition that where a claim rests solely on statutory grounds, the repeal of the statutory authority for that claim is fatal to the continued existence of the claim, no matter what stage the progress of it may be. Defendants assert that *Physicians Committee* and the cases it relied upon hold that the unconditional repeal of a special remedial statute without a savings clause stops all pending actions where the repeal finds them. A close look at the cases, however, demonstrates that the rule is not as broad as defendants assert and that it cannot be applied to cause the dismissal of plaintiff's action here.

The "special remedial statute" involved in *Physician's Committee* was the Anti-SLAPP statute (Code of Civ. Proc. § 425.16). Defendant Tyson brought an Anti-SLAPP motion to dismiss the complaint, which was granted by the trial court. While the appeal on that result was pending, newly enacted Code of Civ. Proc. § 425.17 became effective, which limited the availability of the Anti-SLAPP motion to eliminate the ability of defendants such as Tyson to invoke it. The Court of Appeal held that the version of the Anti-SLAPP

statute in effect at the time of the appeal governed the remedy thereunder and thus reversed the trial court's dismissal upon the ground that Tyson no longer was qualified to make an Anti-SLAPP motion.

The court in *Physicians Committee* held that the Anti-SLAPP motion was a "remedial statute" which established a remedy no longer available to Tyson. In so doing, the Court followed *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679. *Brenton* was also a review of a dismissal of an action under the Anti-SLAPP statute where the dismissal was granted by the trial court while the moving party had been eligible for such relief but where the enactment of Code of Civ. Proc. § 425.17 during the pendency of the appeal from that dismissal obviated the defendant's eligibility to invoke the Anti-SLAPP statute. *Brenton* concluded that the Anti-SLAPP procedure was remedial and thus the legislative revocation of that remedy, even on appeal, rendered it unavailable to the defendant therein.

Brenton relied on *Tapia v. Superior Court, supra,* 53 Cal.3d. 282 and clearly defined what a "remedial statute" is in the context of the rule that repeal of a remedial statute stops all actions where the repeal finds them: "It is the effect of the law, not its form or label, that is important for the purposes of this analysis...[citations omitted]...The issue is whether applying section 425.17 would impose new, additional or different liabilities on MII [the defendant] based on MII's past conduct, or whether it merely regulates the conduct of the ongoing litigation." *Brenton, supra,* at 689. The court then evaluated § 425.16 as being "procedural" in that it provided a screening mechanism to allow for an early determination as to whether the plaintiff in certain types of suits can demonstrate sufficient facts to permit the matter to go to a trier of fact. Thus, the repeal of a portion of

the Anti-SLAPP statute merely took away that procedural screening device from certain categories of defendants, leaving the substance of the claims against them to proceed unaffected in the normal manner that other lawsuits progress.

This procedural effect in *Physicians Committee* and *Benton* is sharply contrasted with what would happen should Proposition 64 be determined to apply retroactively to plaintiff's case here and thus remove plaintiff's standing. Rather than leaving the parties' substantive rights intact, the effect would be to terminate this lawsuit altogether and in the process eliminate the claimed liabilities of defendants herein entirely. While it is indeed possible that these claimed liabilities could be resurrected against the defendants in a new lawsuit pursued by persons with actual injury, the potential liabilities in such a new lawsuit would not be identical to those in this case due to the potential effects of the statute of limitations. As such, Proposition 64 cannot be seen to be either "remedial" or "procedural" for the purposes of the rule stated in *Physicians Committee, Benton* and the other authorities cited by defendants.

Defendants also argue that the impact of Proposition 64 should be viewed as merely a change in the procedural rules applicable to class actions. The idea here is that the rules regarding class certification are procedural in nature, and that a change in who could bring a representative action under the UCL is therefore procedural in nature, hence subject to the rule in *Physicians Committee*. Defendants' authorities for this proposition do hold that the class certification process is "procedural" in the sense that it does not implicate the substance of the underlying claims, but they have nothing to do with whether the ability to bring a representative action as a private Attorney General is "procedural" as opposed to "substantive" for the

purposes of the rule in *Physicians Committee*. Indeed, as the above quoted language from *Brenton* instructs, it is not the label on a law that counts, but rather its effect. As is set forth above, the effect of applying Proposition 64 to plaintiff's action will not simply alter how this case would proceed, but instead would terminate it.

It is also possible to conceptualize the effect of Proposition 64 as merely altering the definition of who has standing to raise a UCL claim. From such a perspective, it could then be argued that standing is a procedural matter and thus under the rules of interpretation set forth above, Proposition 64 must be interpreted retroactively. It is true that authorities in a variety of contexts describe standing as a procedural concept. See, for example, *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349 [standing is referred to in passing as a "technical or procedural defense"]; *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1521-24 [statutory changes eliminating the requirements for the appointment of a personal representative in probate which created plaintiff's standing to file the subject lawsuit were procedural, hence retroactive]. Nonetheless, to borrow the "procedural" label from such authorities is precisely what *Tapia* says should not be done. Instead, the effect of a retroactive application governs the analysis.

This court notes that *Governing Board v. Mann* (1977) 18 Cal.3d. 819, cited by the defendants, might be read to support their position. In *Governing Board*, a school district filed an action to determine that the defendant teacher's conviction of possession of marijuana constituted grounds to terminate him for "moral turpitude" under Education Code § 13403. The trial court determined that the conviction did constitute grounds for termination. While the matter was on appeal, Health and Safety Code § 11361.7

was enacted which specifically prohibited a school district from terminating a teacher for a marijuana conviction. In holding that Health and Safety Code § 11361.7 was retroactive, the court stated that "where the *government's* authority rests solely upon a statutory basis, 'a repeal of such a statute without a savings clause will terminate all pending actions thereon...' [emphasis added]." *Id.* at 822. Thus, the retroactive interpretation was applied to protect the rights of a citizen against governmental intrusion. Such a narrow reading of *Governing Board* is consistent with the later case of *Tapia v. Superior Court, supra,* 53 Cal.3d. 282, where the court held that a modified criminal statute without legislative direction as to retroactivity would be applied retroactively where to do so would reduce the punishment of the criminal defendant. Id. at 300-01. No authority has been cited to render these authorities applicable to result in the dismissal of this case.

Thus, the general rule of statutory interpretation set forth in *Tapia* and *Evangelatos* applies here. As to the language of the statute, defendants point to the wording that only those qualified under Proposition 64 "may pursue" an action under the UCL appears in both the new statute and the voter materials. Scarborough Decl., Ex. A. Defendants assert that this language must be read to include both the filing of new actions and the continuation of those existing prior to the effective date of Proposition 64.

The term "may pursue" might reasonably be read to apply to new filings as readily as to the continuation of existing actions. The standard set forth in *Evangelatos*, however, is whether the proposition's language or the materials considered by the voters can be read as an explicit expression of an intent to have retroactive application so as to overcome the presumption

of prospective operation. Under this standard, the "may pursue" language cannot be seen to be an explicit expression of retroactive intent. Given the absence of any explanation in the official materials presented to the voters that Proposition 64 would apply to existing lawsuits, it would be pure speculation to conclude that the electorate read the language "may pursue" in that manner and thus made a conscious choice for retroactive application. Such is especially true given that the language of the proposition or of the voter materials could easily have been more explicit so as to eliminate any question as to what those who voted for proposition had in mind relative to its retroactive application. *See, Jenkins v. County of Los Angeles* (1999) 74 Cal.App.4th 524, 535-36.

CONCLUSION AND FURTHER PROCEEDINGS

Upon the foregoing, this court concludes that Proposition 64 does not apply to cases already on file as of the time of its enactment. Accordingly, defendants' Motion for Judgment on the Pleadings is denied.

This matter is set for a further case management conference and for the hearing on Plaintiff's Objections to Discovery Referee's Proposed Order at 9:30 a.m. on February 18, 2005.

CERTIFICATION UNDER CODE OF CIVIL PROCEDURE §166.1

This court believes that the question presented herein is a controlling question of law on this and other cases pending throughout California as to

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which there are substantial grounds for difference of opinion, the appellate resolution of which may material advance the conclusion of this and other litigation.

Dated: December 29, 2004

Judge of the Superior Court

Superior Court of California
County of San Francisco

CALIFORNIA LAW INSTITUTE, Plaintiff(s) vs. VISA U.S.A., ET AL, Defendant(s)	Case Number: 421180 **CERTIFICATE OF MAILING** (CCP 1013a (4))

I, Andrea Carney, a Deputy Clerk of the Superior Court of the City and County of San Francisco, certify that I am not a party to the within action.

On December 29, 2004 I served the attached ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS by placing a copy thereof in a sealed envelope, addressed as follows:

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and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: December 29, 2004

GORDON PARK LI, Clerk

By: Andrea Carney

Andrea Carney, Deputy Clerk