Fourth Civil Case No.: _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JANICE DURAN, an individual, and JULIA RAMOS, an individual, for themselves and as putative class representatives

Petitioners,

vs.

SUPERIOR COURT OF SAN BERNARDINO COUNTY,

Respondent.

THE MAY DEPARTMENT STORES COMPANY
[erroneously sued as ROBINSONS-MAY, INC.]

Real Parties in Interest,

HONORABLE MARTIN HILDRETH
SAN BERNARDINO SUPERIOR COURT, DEPARTMENT R-11
CASE NO. RCV 42727

PETITION FOR PEREMPTORY OR ALTERNATIVE WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF; IMMEDIATE STAY REQUESTED

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I.

INTRODUCTION

Ever seeking to avoid accountability for its systemic violation of California's overtime laws, Defendant Robinsons-May, Inc. ("Robinsons-May") argued to the Trial Court that the November 2004 passage of state ballot Proposition 64 ("Prop. 64") operates in this lawsuit to bar Petitioners' representative claim filed pursuant to BUS. & PROF. CODE § 17200, *et seq*. ('Unfair Competition Law", or "UCL").[1] In response, the Trial Court struck Petitioners' representative allegations.

In doing so, the Trial Court erred. For the following reasons, Prop. 64 does not preclude Petitioners' representative claim:

1. In California, a *change* to existing law is presumed to operate prospectively only, absent a clearly expressed contrary intent which is absent here;
2. Statutory and decisional law *precludes* application of the "statutory repeal" rule to this matter; and,

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[1] The Court, in *Kraus v. Trinity Management Services, Inc*., 23 Cal.4th 116 (2000), used the term "representative action" to refer to a UCL action, not certified as a class, in which a plaintiff seeks disgorgement and/or restitution on behalf of persons other than or in addition to the plaintiff. *Kraus*, at 126, n. 10. Petitioners adopt that Court's terminology, referring to a non-certified UCL claim as a "representative action".

3. The significant changes to the UCL imposed by Prop. 64 were unconstitutionally applied to this action.

After the Trial Court incorrectly applied Prop. 64 to this case, which was filed in 1999, Petitioners sought to minimize the prejudice caused by this error, seeking leave to amend their complaint to state class allegations for their UCL claim. The Trial Court denied Petitioners' request, ruling that a prior motion for certification of *other* claims stood as an absolute bar to Petitioners' ability to amend their complaint to state class allegations for their UCL claim. In so ruling, the Trial Court erred for the second time.

The thousands of employees injured by Robinsons-May's ongoing pattern and practice of unlawful conduct deserve better than to have their cause discarded after years of litigation. Their constitutional rights have been violated by a pair of erroneous Orders that deprived them and Petitioners of their substantive and procedural due process rights.

Profound prejudice will result if Petitioners are required to try their case as individuals and then seek appellate review for the opportunity to return and try their representative UCL claims. This Court must act to correct the twofold error of the Trial Court, by protecting the parties and the judicial system from the burdens associated with (1) a trial that would see individual and representative claims separated from each other by years, and (2) the concomitant waste arising from duplicative proofs.

II.

PETITION FOR PEREMPTORY OR ALTERNATIVE WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF

A. Authenticity of Exhibits.

1. All exhibits accompanying this Petition are true copies of original documents. VERIFICATION AND DECL. OF H. SCOTT LEVIANT attached hereto, at ¶¶ 3-11. Each of the exhibits are incorporated herein by reference as though fully set forth. The exhibits are paginated and page references in this Petition refer to the consecutive pagination.

B. Beneficial Interest of Petitioner; Capacities of Respondent and Real Parties in Interest.

2. Petitioners are the Plaintiffs in an action entitled *Duran, et al. v. Robinsons-May, Inc.*, case number RCV 42727, now pending before the Hon. Judge Martin Hildreth in Division R-11 of the Ranch Cucamonga Branch of the San Bernardino Superior Court. Defendant Robinsons-May, Inc. is named as the Real Party In Interest.[2]

[2] Petitioners are informed that Defendant's correct legal name is THE MAY DEPARTMENT STORES COMPANY dba ROBINSONS-MAY. Defendant was originally named as ROBINSONS-MAY, INC.

C. Chronology of Pertinent Events

1. History Of The Action

3. This action was filed on September 9, 1999. The Petitioners worked for Respondent Robinsons-May as "Area Sales Managers". The operative Second Amended Complaint ("SAC") alleges violation of the overtime statutes, LAB. CODE § 1194, *et seq*., conversion, and violation of the UCL, for which Petitioners seek, amongst other relief, restitution and injunctive and declaratory relief.[3] Underlying these causes of action are factual allegations that Robinsons-May misclassified as exempt from the overtime laws, and failed to pay overtime compensation owed to, Petitioners and some 2,000 or more former or current "Area Sales Managers" ("ASMs") who worked during the relevant period at Defendant's retail department stores.

4. During the period covered by the SAC, Robinsons-May's ASMs worked overtime hours (habitually in excess of 50 hours per week, according to Defendant) but were classified by Robinsons-May as exempt from the overtime laws and not paid overtime compensation. As a result of Robinsons-May's uniform company policies, procedures

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[3] "A UCL action is an equitable action by means of which a plaintiff may recover money or property obtained from the plaintiff ***or persons represented by the plaintiff*** through unfair or unlawful business practices." *Cortez v. Purolator Air Filtration Products Co*., 23 Cal. 4th 163, 173 (2000) (emphasis added).

and practices imposed on its department stores, these ASMs spent insufficient time on exempt tasks to justify their being so classified.

5. As part of its ongoing, systemic pattern and practice of violating overtime laws, Robinsons-May:

- Effectively required ASMs to work more than 40 hours per week;
- Deemed each ASM exempt based upon their job title rather than any consideration of actual work performed;
- Paid no overtime wages to any ASM;
- Kept no detailed records of ASMs actual daily work activities;
- Conducted no studies of how ASMs spent their work time;
- Failed to train ASMs on the difference between exempt and nonexempt work;
- Provided a uniform job description for ASMs throughout its operations; and,
- Required ASMs, through standardized policies and procedures, to spend the large majority of their time engaged in tasks that, as a matter of law, were and are not exempt.

6. On or about June 29, 2001, Petitioners filed a Motion for Class Certification. Petitioners' Motion sought certification of their Labor Code and Conversion Causes of Action. However, Petitioners

did not seek to certify their UCL claim, which included allegations that Petitioners were proceeding as private attorneys-general on behalf of all current and former ASMs owed overtime pay by Robinsons-May.

7. The Trial Court denied Petitioners' Motion for Class Certification. Petitioners appealed. The Court of Appeal affirmed the order denying certification, and a remittitur issued on August 5, 2003. Petitioners' proceeded to conduct discovery to support their representative UCL claim.

2. November 2, 2004 Passage Of Proposition 64.

8. On November 2, 2004, California voters passed Prop. 64. Prop. 64 amends BUS. & PROF. CODE §§ 17203, 17204, 17205, 17535 and 17536. With respect to this action, the changes at issue relate to sections 17203 and 17204.

9. Prior to the passage of Prop. 64, any plaintiff "acting for the interests of itself, its members or the general public" could bring a UCL claim. However, section 17204 was amended to circumscribe standing to bring UCL claims. Under the revised section, a person may only pursue an action for relief under the UCL if he or she has "suffered injury in fact and has lost money or property as a result of such unfair competition."

10. Section 17203 was amended to append new requirements for

private representative actions. In actions filed after the passage of Prop. 64, a plaintiff bringing a representative claim must meet the standing requirement of revised section 17204 and comply with CODE CIV. PROC. § 382 (governing class actions).

11. After the passage of Prop. 64, Robinsons-May, like many defendants across the state, filed a Motion to Strike the representative allegations from Petitioners' UCL Cause of Action, arguing that Prop. 64 applied retroactively to pending cases. The Trial Court agreed, and, in an Order entered January 21, 2005, the Court struck Petitioners' representative allegations. EXH. "1", at 1-3. However, the Court acknowledged the uncertainty surrounding the retroactivity of Prop. 64 and provided a Certification to that effect in its Order:

> Notwithstanding the instant ruling, this Court believes that the question presented herein — *i.e.*, the applicability to this litigation of certain statutory provisions, as amended by Proposition 64 — is a controlling question of law in this and other cases pending throughout California as to which there are substantial grounds for difference of opinion. ***The appellate resolution of this controlling question of law may materially advance the conclusion of this and other litigation***. Hence, pursuant to Code of Civil Procedure section 166.1, ***this Court invites appellate review of the instant order. Likewise, this Court invites such review to take place as soon as practicable***.

EXH. "1", at 3, emphasis added.

12. In response to the Trial Court's ruling on the retroactivity of Prop. 64, Petitioners moved for leave to file a Third Amended

Complaint that alleged the UCL claim in accordance with the changes imposed by Prop. 64. EXH. "7", at 74-90. The Trial Court denied Petitioners' Motion for Leave to File Third Amended Complaint; that Order was filed on February 7, 2005. EXH. "3", at 19-20.

D. Basis for Relief

13. The issue presented by this Writ Petition is whether the Trial Court improperly applied Prop. 64 retroactively, and, as a consequence, violated the due process rights of Petitioners when it struck Petitioners' representative allegations under the UCL, and then subsequently denied Petitioners leave to amend their complaint to state class allegations for their UCL cause of action.

14. Petitioners contend that the Trial Court has violated the substantive due process rights of Petitioners, and roughly 2,000 ASMs represented by Petitioners, when it denied Petitioners the ability to prosecute any form of representative action on behalf of those ASMs. While a non-retroactive, legislative modification to a statute can, at times, be imposed upon future court proceedings, a legislative change cannot, by a purported change in procedure, cut off all relief. The consequence of the Trial Court's rulings in this matter was the denial of relief to Petitioners and many hundreds of ASMs, at a minimum, in violation of their substantive due process rights.

15. In addition, when the Trial Court denied Petitioners' request for leave to amend their complaint and state class allegations for their UCL cause of action (from which the Trial Court had struck representative allegations on the improper ground the Prop. 64 applied retroactively), Petitioners' procedural due process rights were violated. Petitioners were denied an opportunity for hearing as to whether they can support a UCL class action, on the erroneous ground that a previous class ruling as to other causes of action has any bearing on whether Petitioners can now support certification of their UCL claim.

16. The 5-year deadline for bringing the action to trial (as extended by agreement) is rapidly approaching. On January 25, 2005, the Trial Court stayed this action for 60 days. When that stay expires, Petitioners will not be protected unless this Court issues an immediate stay while the retroactivity and amendment issues are resolved.

E. Absence of Other Remedies

17. The present orders granting a Motion to Strike and denying Leave to Amend are not appealable. CODE CIV. PROC. § 904.1. Moreover, delay of review until after final judgment would be an inadequate remedy and would result in irreparable harm to the parties, to as many as 2,000 affected ASMs, and to the judicial system, in that:

a. Many hundreds or thousands of ASMs affected by

Robinsons-May's conduct will lose any opportunity for redress; and,

b. Multiple, lengthy trials in this matter would unreasonably burden Petitioners, their counsel, and the scarce resources of this state's judicial system.

Petitioners have no adequate remedy other than relief sought in this petition. The issues raised in this Petition are is purely legal and are essential to perhaps hundreds of cases pending throughout the state. The Courts of Appeal are divided on the issue of whether Prop. 64 applies retroactively to pending cases. Petitioners will not be adequately protected in this action by awaiting decisions from other Courts, particularly as to the novel question concerning Petitioners' request for leave to amend their complaint. These issues will not go away.

III.

PRAYER

Petitioners pray that this Court:

1. Issue an Order staying the proceedings below while this Court considers this Petition;

2. Issue a Peremptory Writ mandating that Respondent Superior Court withdraw its Order striking Petitioners' representative allegations and apply the UCL as it existed prior to the passage of Prop. 64;

3. In the alternative, issue a Peremptory Writ mandating that Respondent Superior Court permit Petitioners to amend their Second Amended Complaint to state class allegations related to their UCL Cause of Action;

4. In the alternative, issue an Alternative Writ requiring Respondent Superior Court to withdraw the Order striking Petitioners' representative allegations and apply the UCL as it existed prior to the passage of Prop. 64, or requiring Respondent Superior Court and/or Real Party in Interest to show cause why such withdrawal should not take place;

5. In the alternative, issue an Alternative Writ requiring Respondent Superior Court to permit Petitioners to amend their Second Amended Complaint to state class allegations related to their UCL Cause of Action, or requiring Respondent Superior Court and/or Real Party in Interest to show cause why such amendment should not take place;

6. Award Petitioners their costs pursuant to the *California Rules of Court*;

7. Award Petitioner their attorneys' fees; and,

8. Grant such other relief as may be just and proper.

Dated: March 15, 2005. Respectfully submitted,

ARIAS, OZZELLO & GIGNAC, LLP

By: _____
MIKE ARIAS
MARK OZZELLO
H. SCOTT LEVIANT
Attorneys for Plaintiffs

DISCUSSION

IV.

WRIT RELIEF IS ESSENTIAL TO ANSWER AN URGENT QUESTION OF FIRST IMPRESSION, RESOLVE AN ISSUE OF URGENT STATEWIDE IMPORTANCE, AND TO PREVENT THE BURDENS IMPOSED BY MULTIPLE RETRIALS

The question of whether a statute applies retroactively has not, over the years, been answered with a simple and consistent response. Instead, courts have looked to numerous factors when asked to determine whether a statute applies retroactively.[4]

The simple case, in which a statute contains an express declaration of retroactivity, requires little discussion. The singular contribution of such cases is the identification of the limiting factor governing retroactivity analysis: a statute cannot be applied retroactively when to do so would violate constitutional rights. *Myers v. Philip Morris Companies, Inc*., 28 Cal. 4th 828, 846 (2002) ("An established rule of statutory construction requires us to construe statutes to avoid 'constitutional infirmit[ies].' ").

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[4] Initiative measures are subject to the ordinary rules and canons of statutory construction. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1212 (1988) , citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 244-246 (1978), and other authority.

With the simple scenario discarded, what remains is the hodgepodge of decisions addressing the retroactivity of statutes where an express statement of retroactivity is absent. However, from this muddled body of law percolate clear and guiding principles identifying when the retroactive application of a statute is impermissible.

The overriding principle, articulated in virtually every case to address issue, is the presumption that statutes apply prospectively:

> It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise.

Tapia v. Superior Court, 53 Cal. 3d 282, 287 (1991).[5] This presumption provides the first rule of statutory interpretation, when an express declaration of retrospectivity is absent, and this presumption leads to the inevitable conclusion that Prop. 64 cannot properly apply retroactively.

In the absence of an *express* declaration of retrospectivity, courts have turned to the *intent* of the legislature (or electorate):

> As Chief Justice Gibson wrote for the court in *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, supra, 30 Cal.2d 388, 182 P.2d 159—the seminal retroactivity decision noted above—"[i]t is

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[5] Countless decisions echo this fundamental principle. *See, e.g., Myers v. Philip Morris Companies, Inc.*, 28 Cal. 4th 828, 840-841 (2002); *People v. Hayes*, 49 Cal. 3d 1260, 1274 (1989); *Evangelatos, supra,* 44 Cal. 3d at 1206-1209; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, 30 Cal. 2d 388, 393 (1947) (*Aetna*); *Jones v. Union Oil Co.*, 218 Cal. 775, 777 (1933); *In re Estrada*, 63 Cal. 2d 740, 746 (1965).

> an established ***canon of interpretation*** that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent."

Evangelatos, supra, 44 Cal. 3d at 1207. The *Evangelatos* Court engaged in an exhaustive analysis of the intent of the electorate before ultimately concluding that Proposition 51, which abolished joint and several tort liability for non-economic damages, did not apply retroactively. *Id*., at 1209-1221. As *Evangelatos* reaffirmed, the emphasis on *intent* is simply the proper application of the canons of statutory interpretation in instances where silence as to retroactivity creates a lingering ambiguity.

The *Evangelatos* Court also gave weight to the factor of "detrimental reliance" when considering whether an intiative applied retroactively:

> Although, as we have noted, there is no indication that the voters in approving Proposition 51 consciously considered the retroactivity question at all, if they had considered the issue they might have recognized that retroactive application of the measure could result in placing individuals who had acted in reliance on the old law in a worse position than litigants under the new law.

Id., at 1215; *see also*, 1215-1218. The *Evangelatos* Court held that it would violate principles of statutory construction to presume that the electorate intended unanticipated consequences:

> As we have explained above, the well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent gives recognition to the fact that retroactive application of a statute often entails the kind of unanticipated consequences we have discussed, and ensures that courts do not assume that the Legislature or the electorate intended such consequences unless such intent

clearly appears.

Id., at 1218. Unlike *Californians for Disability Rights v. Mervyn's, LLC*, 126 Cal. App. 4th 386 (1st Dist., 2005) (*C.D.R.*), the recent Prop. 64 decisions of *Benson v. Kwikset Corp*., 126 Cal. App. 4th 887, 24 Cal.Rptr.3d 683 (4th Dist., 2005) and *Branick v. Downey Sav. and Loan Ass'n*, 126 Cal. App. 4th 828, 24 Cal. Rptr. 3d 406 (2nd Dist., 2005) failed to consider or apply the "detrimental reliance" factor analyzed and applied by *Evangelatos*.

A number of cases imply a distinction between "procedural" and "substantive" laws, suggesting that "purely procedural" statutes always apply retroactively to pending actions. *See, e.g., Brenton v. Metabolife Intern. Inc*., 116 Cal. App. 4th 679, 688-689 (2004). While this distinction is frequently mentioned, it has effectively been discredited. For example, the Court, in *Russell v. Superior Court*, 185 Cal. App. 3d 810 (1986), said, "As *Aetna* makes clear, the distinction between 'substantive' and 'procedural' is a misdirection. Both types of statutes may affect past transactions and be governed by the presumption against retroactivity." *Id*., at 816. Rather, "it is the law's effect, not its form or label, which is important." *Tapia, supra*, at 289, citing *Aetna, supra*, at 394.

Finally, a number of cases, including the just-issued *Benson* and *Branick* decisions, assert a bright-line rule for resolving the retroactivity question in cases where statutes are repealed. Sometimes called the

"statutory repeal" doctrine, this rule purports to authorize retroactive application of certain new laws, if they affect a statutory remedy not otherwise recognized under the common law. However, *Benson, Branick* and the Trial Court err by applying this rule to a ballot proposition that merely *changes*, rather than repeals, existing law. GOVT. CODE § 9605. By statutory mandate, Prop. 64 did not operate to repeal any portion of the UCL; based thereon, it was clear error to apply the "statutory repeal" doctrine in this circumstance.

Moreover, these "statutory repeal" cases, as applied here, are in logical conflict with a line of decisions addressing the propriety of retroactive *changes* to a statute. *See, e.g., Santangelo v. Allstate Ins. Co.*, 65 Cal. App. 4th 804, 815 (1998); *Aronson v. Superior Court*, 191 Cal. App. 3d 294, 297 (1987). Applying the "statutory repeal" rule, *Benson, Branick* and the Trial Court overstep, the constitutional limitations upon retroactive legislation.

Determining whether Prop. 64 applies retroactively in a particular case requires the proper application of these several factors. In this instance, the Trial Court's analysis was incomplete and contrary to statutory and decisional authority, resulting in an incorrect Order regarding the retroactivity of Prop. 64.

The Trial Court's erroneous decision regarding the retroactivity of Prop. 64 laid the groundwork for subsequent error. After the Trial Court

struck Petitioners' representative allegations in their UCL claim, the Trial Court then denied Petitioners' motion to amend their complaint to state class allegations for their UCL claim. Instead, the Trial Court ruled that the previous denial of class certification for other Causes of Action (Labor Code violations and Conversion) precluded any attempt to certify a UCL claim. This ruling violated Petitioners' right to procedural due process.

This decision raises a question of first impression: If Prop. 64 applies retroactively to pending cases, eliminating representative UCL claims in the process, should Petitioners be permitted to allege class allegations for their UCL Cause of Action, despite having sought class certification of other causes of action previously in the case?[6] Setting aside the due process concern, fundamental fairness requires that, if Petitioners must operate under the revised UCL, they must be entitled to exercise all of its new provisions.

As it now stands, Petitioners have lost their representative claims *and* have been denied the opportunity to allege a UCL class action. It is likely that, as a result of the Trial Court's combined rulings, Petitioners will

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[6] This question of first impression is only relevant if this Court disregards Govt. Code § 9605 (and other authority cited herein) and rules that Prop. 64 applies retroactively to cases pending prior to the passage of Prop. 64. Petitioners assert that retroactive application is improper. However, if this Court finds otherwise, then Petitioners request that this Court address the subsequent issue of their right to amend.

be forced to try their case and then, after an appeal, return not just to square one at trial, but to *pre-trial* class certification. In other words, without immediate intervention by this Court, Petitioners will likely move backwards from a trial to pre-trial motion practice, after enduring the significant delay occasioned by an appeal. Such a result would be damaging to Petitioners and wasteful of the time and resources of all affected, including the Trial Court. This Court must intervene to: (1) correct the dual errors of the Trial Court; (2) answer a pivotal question of first impression (if necessary); and, (3) prevent a gross miscarriage of justice that would result if Petitioners are forced to try their two individual cases and then appeal the amendment and class pleading issue thereafter.

A. Prop. 64 Does Not And Should Not Apply To Pending Cases.

1. California Follows The Time-Honored Principal That Statutes Are Presumed To Operate Prospectively.

> In the recent decision of *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79-80, 103 S.Ct. 407, 412-413, 74 L.Ed.2d 235 Justice (now Chief Justice) Rehnquist succinctly captured the well-established legal precepts governing the interpretation of a statute to determine whether it applies retroactively or prospectively, explaining: "*The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. [Citations.] This court has often pointed out: '[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past....* The rule has been expressed in varying degrees of strength but always of one import, that *a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.*" ' [Citation.]"

Evangelatos, supra, 44 Cal. 3d at 1207.

Just as federal courts apply the legal principle that statutes operate prospectively, California courts apply the same presumption: 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. "[T]his rule is particularly applicable to a statute which *diminishes* or extinguishes an existing cause of action." *Evangelatos, supra*, 44 Cal. 3d at 1223.

Here, the Trial Court retroactively eliminated Petitioners' representative action, affecting roughly 2,000 individuals. Because of this draconian effect, the presumption of prospectivity is vital.

A statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer. *Western Security Bank v. Superior Court*, 15 Cal. 4th 232, 244 (1997). Moreover, "a statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective." *Myers, supra*, at 841.

California's Supreme Court recently described the strength of the presumption that new legislation should not apply retroactively:

> "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.... For that reason, the 'principle that the legal

> effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' "

McClung v. Employment Development Dept., 34 Cal. 4th 467, 475 (Nov. 4, 2004).[7] Because there is no express statement of retroactivity, Prop. 64 must be presumed to operate *prospectively*.

2. The *Evangelatos* Standard: Because Prop. 64 Lacks An Express Declaration Of Intended Retroactivity, And Because Extrinsic Sources Do Not Provide "Clear And Unavoidable" Evidence Of Such Intent, The Presumption Of Prospective Application Applies.

Absent an express declaration that the Legislature intended retrospectivity, a new statute is *presumed* to operate prospectively. *See*, *Evangelatos*, *supra*, 44 Cal. 3d at 1207-1208; *see also*, *Tapia*, *supra*, 53 Cal. 3d at 287. Drafters of new legislation are familiar with this rule, and when they intend a statute to operate retroactively they use clear language to accomplish that purpose. *See, e.g.*, *DiGenova v. State Board of Education*, 57 Cal. 2d 167, 176 (1962).

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[7] This recent decision of the California Supreme Court reaffirms the vitality of this long-standing rule. *See, e.g., Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, 30 Cal. 2d 388 (1947); *Interinsurance Exchange of Auto. Club of So. Calif. v. Ohio Cas. Ins. Co.*, 58 Cal. 2d 142, 149 (1962); *Marriage of Bouquet*, 16 Cal. 3d 583, 587 (1976); *Evangelatos, supra,* 44 Cal. 3d at 1208-1209 (1988).

Even a *strong suspicion* of retroactive intent is insufficient to overcome the presumption against the retroactive application of a new law:

> We strongly suspect that, if asked a question about retroactive application, the Legislature would have said the change should apply to past abuse. However, we also suspect the Legislature never considered whether to make the amendment retroactive. We find no clear indication of retroactive intent.

ARA Living Centers - Pacific, Inc. v. Superior Court, 18 Cal. App. 4th 1556, 1561 (1993) (change in elder abuse law held *prospective* only, despite court's suspicion of retroactive intent).

The litigation that followed MICRA tort reform legislation provides an example of how the "intent" element has been applied by courts. Two separate panels of the Court of Appeal addressed whether one of the tort reform provisions of MICRA should apply retroactively to a cause of action that accrued prior to MICRA's enactment but which was tried after the act went into effect. *Bolen v. Woo*, 96 Cal. App. 3d 944 (1979); *Robinson v. Pediatric Affiliates Medical Group, Inc.*, 98 Cal. App. 3d 907 (1979). Both Courts of Appeal concluded that, in the absence of a specific provision calling for such retroactive application, the general presumption of prospective application applied.

Here, Prop. 64 is silent as to its retroactivity. Moreover, Prop. 64's findings suggest that the measure is only 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 they have no client who has been injured in fact under the standing requirements of the United States Constitution." EXH. "9", at 134, emphasis added.

The absence of retroactivity language in Prop. 64 contrasts sharply with an earlier tort reform initiative that appeared on the November 5, 1996 ballot. Proposition 213 enacted CIV. CODE § 3333.4, which bars uninsured motorists from recovering non-economic damages if they are injured by another driver. Unlike Prop. 64, Proposition 213 specifically provided that "[i]ts provisions shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997." *Yoshioka v. Superior Court*, 58 Cal. App. 4th 972, 979 (1997) (which held that Proposition 213 applied to cases that had not been tried as of the date of its enactment).

The inclusion of retroactivity terms in Proposition 213 was an evident response to the 1988 holding of the California Supreme Court in *Evangelatos* that Proposition 51 did not apply retroactively. *Evangelatos* held that the 1986 initiative, which eliminated the joint and several liability rule as to non-economic damages, did not apply retrospectively to causes of action that had accrued before the initiatives effective date.

The Supreme Court has continued to reaffirm the strong presumption against retroactive application of statutory amendments. Two years prior to the 2004 election, the Supreme Court reaffirmed the *Evangelatos* principles

in *Myers v. Philip Morris Companies, supra*, 28 Cal. 4th at 840-845. In *Myers*, the Court held that the abolition of tobacco companies' immunity from suit was not retroactive because there was "no express language of retroactivity" or sources "providing a clear and unavoidable implication that the Legislature intended retroactive application." *Id*., at 884.

Immediately following the 2004 election, the Supreme Court again articulated and applied the *Evangelatos* test in *McClung*. There, the Court held that an amendment of the Fair Employment and Housing Act extending liability for harassment of non-supervisory coworkers was not retroactive, finding "nothing to overcome the strong presumption against retroactivity." *McClung*, *supra*, at 475-476.

Had Prop. 64's drafters wished to make their measure retroactive, they would have inserted similar language into their measure. The fact that they did not means that the measure lacks the "clear legislative intent" required to make it apply retroactively.

Courts may also resort to legislative history, such as the ballot pamphlet, where there is no express provision of retroactive application. *Evangelatos*, *supra*, 44 Cal. 3d at 1210-1211. But 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.[8] In fact,

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[8] EXH. "6", at 63, 65-67.

consistent with the measure's findings, the Legislative Analyst explained that Prop. 64 "prohibits any person, other than the Attorney General and local pubic prosecutors, from ***bringing*** a lawsuit for unfair competition unless the person has suffered injury and lost money or property." (emphasis added.) The proponents' ballot arguments also emphasized that Prop. 64 would allow "only the Attorney General, district attorneys, and other public officials ***to file*** lawsuits on behalf of the People of the State of California . . ."[9] (emphasis added.) Prop. 64 did not put the voters on notice that its provisions were retroactive.

As if commenting on this case, the Supreme Court analyzed another ballot proposition and concluded that it should not apply retroactively:

> Applying this general principle in the present matter, we find nothing in the language of Proposition 51 which expressly indicates that the statute is to apply retroactively. Although each party in this case attempts to stretch the language of isolated portions of the statute to support the position each favors, we believe that a fair reading of the proposition as a whole makes it clear that the subject of retroactivity or prospectivity was simply not addressed. As we have explained, under Civil Code section 3 and the general principle of prospectivity, the absence of any express provision directing retroactive application strongly supports prospective operation of the measure. Although defendants raise a number of claims in an attempt to escape the force of this well-established principle of statutory interpretation, none of their contentions is persuasive.

Evangelatos, *supra*, 44 Cal. 3d at 1208-1209. In this matter, neither the

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[9] EXH. "6", at 69-73.

text of Prop. 64, nor its legislative analysis, contains an express provision that Prop. 64 was intended to have retrospective application. As such, there is no basis to depart from the ordinary rule of construction that Prop. 64 must operate prospectively. *See*, *Tapia*, *supra*, at 287.

3. Retroactive Application Of Prop. 64 Would Harm Thousands Of Individuals That Relied Upon The UCL's Representative Mechanism.

The presumption that statutes apply prospectively recognizes that retroactive application often causes unanticipated consequences and ensures that courts do not assume that the Legislature or electorate intended such consequences unless such intent is clearly evident. *Evangelatos*, *supra*, 44 Cal. 3d at 1215. Giving retroactive effect to Prop. 64 would have repercussions that voters never intended, including: (1) the denial of relief for thousands of injured employees that chose to rely upon representative, rather than direct, actions; and (2) interference with the decisions, by state and local officials, to abstain from suits while private groups challenge unfair, unlawful and fraudulent conduct.

Here, the "[a]pplication of Proposition 64 to cases filed before the initiative's effective date would deny parties fair notice and defeat their reasonable reliance and settled expectations." *C.D.R.*, *supra*, 126 Cal. App. 4th at 397.

This action affects an estimated 2,000 current and former ASMs that Robinsons-May misclassified as exempt from the overtime laws. Many of these ASMs have elected to rely solely on this action to determine their right to receive overtime compensation. These ASMs have changed position in reliance upon the efficient nature of a UCL representative action. Retroactive application of Prop. 64 could place non-party ASMs (hundreds or thousands of them) in a far worse position than persons filing individual actions against Robinsons-May. In most instances, non-party ASMs would be time barred from recovering some or all unpaid overtime wages. The destruction of rights for so many ordinary workers is an unanticipated consequence to the retroactive application of Prop. 64.

Until the passage of Prop. 64, state and local prosecutors depended on private enforcement actions.[10] *See, e.g., Consumers Union v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963 (1992). Calling an abrupt halt to such cases will require prosecutors who had abstained from suit to decide between filing suit, if statutes of limitation permit, or allowing the conduct to go unchallenged. That decision will affect budgetary and other concerns for officials who are notoriously short of resources.

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[10] As the Legislative Analyst makes clear, "[T]his 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." EXH. "6", at 65-67.

B. The "Statutory Repeal" Cases Do Not Apply Here Because Prop. 64 Served To Amend, Not Repeal, Parts Of The UCL.

The "statutory repeal" doctrine stems from an old line of cases holding, generally, that the repeal of a statute, without a savings clause, before a judgment becomes final, destroys the right of action. *Benson*, *Branick*, and the Trial Court have improperly relied upon this narrow collection of cases, in direct violation of GOVT. CODE § 9605, which precludes application of the "statutory repeal" rule to determine the retroactivity of Prop. 64.

In addition, the application of this rule disregards the clear instructions of the Supreme Court, which has held that the intention of voters is "paramount" when interpreting a ballot initiative. *In re Lance W.*, 34 Cal. 3d 863, 889 (1985). The Trial Court compounded this initial error when it relied upon *Krause v. Rarity*, 210 Cal. 644 (1930), a so-called "statutory repeal" decision which ultimately supports Petitioners and exposes *Benson* and *Branick* as ill-reasoned. The Trial Court, avoiding any discussion of voter intent, erroneously applied the "statutory repeal" doctrine to Prop. 64, in violation of decisional and statutory law.

1. GOVT. CODE § 9605 Explicitly Bars Application Of The "Statutory Repeal" Doctrine.

Decided after the Trial Court ruled, *Branick* and *Benson* both identified GOVT. CODE § 9606 as supporting their decision to retroactively apply Prop. 64 to pending cases.[11] *Branick, supra*, 24 Cal.Rptr.3d at 414-15; *Benson, supra*, 24 Cal. Rptr. 3d at 697. *Branick* and *Benson* both criticized *C.D.R.* for not considering GOVT. CODE § 9606. *Ibid*.

However, it is *Branick* and *Benson* that should be criticized for failing to address GOVT. CODE § 9605, which provides that an amendment to part of a statute does *not* act as a repeal of the statute:

> "Where ***a section or part of a statute is amended, it is not to be considered as having been repealed*** and reenacted in the amended form. The portions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment; and the omitted portions are to be considered as having been repealed at the time of the amendment."

GOVT. CODE § 9605, emphasis added.[12] This statutory mandate for the

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[11] GOVT. CODE § 9606 provides: "Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal."

[12] GOVT. CODE § 9605 codified a principle already recognized under existing law: "When a statute is repealed without a saving clause, and as a part of the same act the law is simultaneously reenacted in substantially the same form and substance, all rights and liabilities which had accrued under the former act will be preserved and enforced." *In re Naegely's Estate*, 31 Cal. App. 2d 470, 474 (1939).

construction of amended statutes applies here. Prop. 64 changed portions of BUS. & PROF. CODE §§ 17203, 17204, 17205, 17535 and 17536. By operation of law (GOVT. CODE § 9605), those changed sections are *not* to be considered as having been repealed.

This principle has been recognized in California for as long as the UCL has existed in any of its statutory forms:

> Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the reenactment takes effect at the same time.

Perkins Mfg. Co. v. Clinton Const. Co. of Cal., 211 Cal. 228, 238 (1931); *see also, In re Dapper*, 71 Cal. 2d 184, 189 (1969).

This Court must reverse the Trial Court and depart from the decisions of *Benson, Branick*, and others, that improperly apply the "statutory repeal" doctrine to Prop. 64, where GOVT. CODE § 9605 expressly prohibits that application.

2. *Krause v. Rarity* Confirms That The "Statutory Repeal" Doctrine Does Not Apply To Prop. 64.

In support of its decision to apply Prop. 64 retroactively, the Trial Court relied upon *Krause v. Rarity*, 210 Cal. 644 (1930) as supporting authority for application of the "statutory repeal" rule. This was error.

Krause v. Rarity represents the common law precursor to GOVT. CODE § 9605. In *Krause v. Rarity*, Rarity, a passenger in a car, was killed when the car was struck by a train, and his heirs filed suit. On appeal, the Supreme Court addressed whether the California Vehicle Act repealed CODE CIV. PROC. § 377, thereby extinguishing the wrongful death claim asserted by the heirs. The Court framed the issues thusly:

> The question is therefore narrowed to this: Did section 141 3/4 work a repeal of section 377 of the Code of Civil Procedure? If so, to what extent and when did such repeal become effective so far as the plaintiffs' cause of action is concerned?

Id., at 653-54. After a detailed analysis of the enactment and operation of the new law, the Court said:

> [T]he Legislature did not stop with the enactment of the portions of the statute which would have worked a repeal irrevocably, but added the provision which in effect continued the right of action on account of the death of the guest. In other words, there has not been a moment of time since the enactment of section 377 to the present time when an action would not lie on behalf of the heirs on account of the death of the guest. ***The only change brought about by the new law was in the nature and character of the proof required in each case.*** There was no abolishment of the right or cause of action, but only a change in the proof required, not to maintain the action, but to permit a recovery.

Id., at 654, emphasis added.[13]

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[13] The Court then applied the very same rule of construction articulated by *Evangelatos*:

> The case, then, falls within the operation of the rule

As was the case in *Krause v. Rarity*, Prop. 64 did not operate to repeal any portion of the UCL. Instead, Prop. 64 changed "the nature and character of the proof required" in a UCL action.

In sum, the analysis undertaken in *Krause v. Rarity* and the mandatory rule of construction stated in GOVT. CODE § 9605 both confirm that Prop. 64 cannot be said to have "repealed" any portion of the UCL. Instead, Prop. 64 "amended" portions of the UCL, and all claims that accrued prior to the amendment continued in full force and effect thereafter. Thus, under both *Krause v. Rarity* and GOVT. CODE § 9605, Prop. 64 cannot apply retroactively to this matter.

3. The "Statutory Repeal" Cases Are Limited By Decisions Addressing Retroactive Changes To Statues.

A robust line of decision address the propriety of retroactive *changes* to statutes and provide further confirmation that the "statutory repeal" rule cannot apply to Prop. 64. *See, e.g., Rosefield Packing Co. v. Superior*

> contended for by the plaintiff, namely, that, although the Legislature has the power to give a statute retrospective operation, if it does not impair the obligation of contracts or disturb vested rights, yet it is to be presumed that no statute is intended to have that effect, and it will not be given that effect, unless such intention clearly appear from the language of the statute.

Id., at 655.

Court in and for City and County of San Francisco, 4 Cal. 2d 120, 122-123 (1935); *Santangelo v. Allstate Ins. Co*., 65 Cal. App. 4th 804, 815 (1998); *Aronson v. Superior Court*, 191 Cal. App. 3d 294, 297 (1987).

As discussed in greater detail, *infra*, at Part IV.D.1, where a *change* in statute is made retroactive, and cuts off an existing remedy without leaving a reasonable means to exercise the remedy, then the retroactive application of that remedy is unconstitutional as to that party. *Santangelo v. Allstate Ins. Co*., 65 Cal. App. 4th 804, 815 (1998).

Here, Prop. 64's *changes*, imposed by the Trial Court, cut off Petitioners' right of representational relief, and did not provide Petitioners with a mechanism by which to obtain any alternative form of representational relief for the 2,000 affected ASMs that were not paid overtime wages by Robinsons-May.

4. *Evangelatos* And Its Successors Are Controlling Precedent For Determining The Scope Of Prop. 64's Retroactive Application.

There are no modern California Supreme Court decision where the "statutory repeal" line of cases have been applied to ballot initiatives, such as that reviewed in *Evangelatos*, or to complex legislation, such as that reviewed in *Myers* and *McClung*. The application of the "statutory repeal" line of decisions to the analysis of Prop. 64 is of highly dubious legitimacy

after *Evangelatos*. *Evangelatos* emphasized the critical importance of implementing actual voter intention in the unique environment of the initiative process.

Legislators engage in a deliberative process in which retroactivity provisions can be proposed, debated and modified before any vote. This confrontational dimension of the legislative process is absent here. The proponents of ballot measures control the text of the proposition, and voter information is based largely upon advertisements and the voter pamphlet.

In *Evangelatos*, the proponents of Proposition 51 argued that is remedial purpose demonstrated voter intent to apply the initiative retroactively. *Evangelatos, supra*, 44 Cal. 3d at 1213. *Evangelatos* rejected this claim, noting that "the fact that the electorate chose to adopt a new remedial rule does not necessarily demonstrate an intent to apply the new rule retroactively to defeat the *reasonable expectations* of those who have changed position in reliance on the old law." *Id*., at 1214, emphasis added. Because retroactive application of a statute often entails unanticipated consequences for pending cases, "the courts do not assume that the Legislature or the electorate intended such consequences unless such intent clearly appears. *Id*., at 1218.

Subsequent decisions are likewise consistent in protecting actual voter intention, which is "paramount" in interpreting a ballot initiative. *In re Lance W.*, *supra*, 37 Cal. 3d at 889. The courts "may not properly

interpret the ballot measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." *Hodges v. Superior Court*, 21 Cal. 4th 109, 114 (1999) (interpreting Proposition 213).

Here, as in *Evangelatos*, a voter would not necessarily have supported Prop. 64, knowing it would apply to cases, such as this one, in which litigants have invested years, tremendous energy, and substantial resources, all in reliance on a 71-year old statute arising from common law principles. This Court cannot assume that voters would accept the consequence that Robinsons-May can avoid paying overtime to thousands of employees. The focus of Prop. 64 was to stop "shakedown" lawsuits, not prevent workers from obtaining overtime pay. There is no basis for inferring that voters intended Prop. 64 to apply to this matter.

The Supreme Court, in *Evangelatos*, demonstrated and mandated detailed analysis of ballot initiatives, when retroactive application is sought. The mechanical application of cases such as *Governing Board of Rialto Unified School District v. Mann*, 18 Cal. 3d 819 (1977) (*Mann*) is inconsistent with that mandate. Substance, not form, is controlling. "Statutory repeal", one of many canons of interpretation, cannot supplant voter intent in the initiative process. This Court cannot presume that the electorate intended repeal, and, it is certainly improper to presume that any repeal was intended to apply in a case such as this.

5. The "Statutory Repeal" Cases Do Not Apply To Terminate Pending Cases Seeking To Benefit The Public, Where The Amending Statute Reaffirmed The Public Rights At Issue.

There is still another reason why "statutory repeal" cases have no bearing here. Public rights are at stake. Prop. 64 did not repeal those public rights; it reaffirmed them. In stark contrast, the "statutory repeal" cases affected purely private rights, and the repeals eliminated those rights. *See, e.g.*, *Mann*, *supra*; *Younger v. Superior Court*, 21 Cal. 3d 102 (1978).

Unlike the statutes at issue in such cases as *Mann* and *Younger*, the UCL is designed to protect the public, not just private citizens. Injunctions obtained under the UCL are public remedies. In *Cruz v. PacifiCare*, 30 Cal. 4th 303 (2003), the Court reaffirmed and extended *Broughton v. CIGNA HealthPlans of California, Inc.*, 21 Cal. 4th 1066 (1999), holding that a claim for injunctive relief is not arbitrable because it is a public, not a purely private, remedy.[14] *Cruz.*, at 315. Thus, the true "party in interest" in this case is not merely the two Petitioners, but the thousands of employees

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[14] *Broughton* said, "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. . . . In other words, the plaintiff in a CLRA damages action is playing the role of private attorney general." *Broughton*., at 1080.

that have worked as ASMs for Robinsons-May and the thousands of members of the General Public that may work for Robinsons-May in future.

Unlike the so-called repeals in *Mann, Younger,* and others, Prop. 64 did not repeal the UCL.[15] Instead, it reaffirmed the public protections and equitable remedies available under the UCL. For this reason, too, the "statutory repeal" cases cannot be applied here.

6. The "Statutory Repeal" Decisions Relied Upon By *Benson, Branick* And The Trial Court Are Misapplied.

Many of the so-called "statutory repeal" decisions are not actually decided on that basis. For example, *Penziner v. West American Finance Co.*, 10 Cal.2d 160 (1937), articulated the "statutory repeal" rule, but *Penzinger* ultimately held, on facts analogous to this matter, that an amendment to the Usury Law did not operate to repeal it.[16]

Younger is frequently cited as a "statutory repeal" decision. *Younger* involved a peculiar set of facts related to a change in the Education Code. The change governed the destruction of records related to marijuana use. During pending proceedings to compel the destruction of records, the

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[15] *Accord*, GOVT. CODE § 9605.

[16] As with *Krause v. Rarity* and GOVT. CODE § 9605, *Penziner's* analysis indicates that the "statutory repeal" rule does not apply where, as here, a statute is *changed* or *amended*, rather than repealed.

Legislature changed the law to provide that the Department of Justice, not the Superior Courts, would order destruction of records. The aggrieved party accepted the new law and sued to compel destruction under the *new* procedure. The Supreme Court concluded that the change in the law had revoked the jurisdiction of the Superior Court. While *Younger* discussed the "statutory repeal" rule, *Younger* was ultimately decided upon *jurisdictional* grounds, and not the "statutory repeal" doctrine. *Id.*, at 110.

And while *Southern Service Co. v. Los Angeles County*, 15 Cal.2d 1 (1940) is also relied upon as a validation of the "statutory repeal" doctrine, it, too, was decided upon another ground: express legislative intent. *Southern Service*, concerning the repeal of a statute allowing the recovery of certain tax overpayments, ultimately held that the legislature's clearly expressed intent was controlling:

> The legislature, no doubt having in mind the holding of this court in Krause v. Rarity, 210 Cal. 644, 654, 655, 293 P. 62, 77 A.L.R. 1327, expressly provided that the withdrawal of the right to refund in the particular class of illegal taxes specified should terminate all pending actions. Its expression in this respect is sufficient to accomplish the declared intent and purpose.

Id., at 13.[17] On this point, *Southern Service* foreshadows the explicit

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[17] As the Supreme Court has repeatedly stated, the intent to legislate retroactively must be explicit. *Southern Service* and *Krause v. Rarity* demonstrate the differing results when retroactive application is expressly declared.

holding (from *Evangelatos*) that legislative intent *must* be considered as one canon of statutory interpretation.

The decision in *Southern Service* underscores the fact, discussed elsewhere herein, that all of the "rules" utilized to determine whether a statute operates prospectively or retrospectively are merely rules of construction. *See, e.g., Callet v. Alioto*, 210 Cal. 65, 67 (1930) (Relying upon various "rules of statutory construction" to determine whether a new section of the Vehicle Code operated retroactively to bar a cause of action). *Southern Service* utilized an express statement of intent by the Legislature to reach its ultimate decision. Here, reliance upon such "rules of construction" is unnecessary, given that Prop. 64 is (1) silent about retroactive operation, and (2) contains language indicating that only prospective application was intended.

Like *Southern Service*, other cases have been incorrectly identified by courts as "statutory repeal" decisions. For example, a collection of recent decisions held that changes in the anti-SLAPP suit law (CODE CIV. PROC. §§ 425.16 and 425.17) applied to pending cases. *See, e.g., Physicians Committee For Responsible Medicine v. Tyson Foods, Inc*., 119 Cal. App. 4th 120 (2004); *Brenton v. Metabolife Intern. Inc*., 116 Cal. App. 4th 679 (2004). In fact, these decisions turn not on the "statutory repeal" doctrine, but on *Aetna's* distinction between legislative changes affecting

past transactions and those impacting only on future events.[18]

Brenton relied upon *Tapia* and clearly defined what constitutes a "remedial statute" 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 [defendant] based on MII's past conduct, or whether it merely regulates the conduct of ongoing litigation." *Brenton, supra*, 116 Cal. App. 4th 689. The *Brenton* Court then concluded that the SLAPP device was merely one of several procedural screening devices, and that a limitation on the use of that device did not impact on the substance of the claims and defenses in a lawsuit. *Physicians* concurs:

> [T]he fact that the anti-SLAPP statute shields litigants from trial of meritless claims arising from the exercise of first amendment freedoms does not alter the fact that it serves as a mechanism for early adjudication of such claims, in other words, as a statutory remedy.

Physicians, supra, at 130. In other words, the statutory "remedy" to which

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[18] Examples of this latter class of statutes include those involving rules of evidence in future trials, *Morris v. Pacific Electric Ry. Co.*, 2 Cal.2d 764, 768 (1935), trial procedure, *Estate of Patterson*, 155 Cal. 626, 638 (1909), rules of service of process, *Abrams v. Stone*, 154 Cal.App.2d 33, 40 (1957), or the awards of costs or attorney fees upon entry of judgment, *Bank of Idaho v. Pine Avenue Associates*, 137 Cal.App.3d 5, 12-13 (1982).

these SLAPP decisions refer is a motion to strike, not a cause of action existing by statute for most of a century and as part of the common law prior.

And, as will be discussed in detail, *infra*, it has been established that "the Legislature cannot, by a purported change in procedure, cut off all remedy." 7 B.E.WITKIN, SUMMARY OF CALIFORNIA LAW, CONSTITUTIONAL LAW § 493 (9th ed. 1988). In that regard, the *Brenton* Court noted that "applying section 425.17 here does not eliminate that purported *right*, but only removes one procedural mechanism for enforcing that right and requires MII to enforce the right to be free of meritless lawsuits by other procedures or remedies." *Brenton, supra*, at 691. In stark contrast, retroactive application of Prop. 64 *destroys* Petitioners' right to represent thousands under the UCL, and would also *destroy* all hope of relief for many ASMs.

7. Even If The "Statutory Repeal" Cases Were Applied Herein, Compelling Evidence Of Contrary Actual Voter Intent Rebuts That Rule Of *Construction*.

Finally, even if, *arguendo*, the "statutory repeal" cases applied to the analysis of Prop. 64, the rule in those cases is merely a rule of construction, not a rule of substantive law. That rule does not supplant other rules of construction or override evidence of voter intent. At most, it offers a

presumption that may be rebutted by other rules of construction and by proof of contrary actual voter intent.

As discussed, *supra*, the Supreme Court has rejected the inflexible application of any single rule of statutory construction, with the lone exception of the retroactivity rule, with its constitutional dimensions. The facts and circumstances, then, guide the application of rules of construction.

The paramount consideration in construing ballot measures is the intent of voters. *In re Lance W., supra*, 37 Cal 3d at 889. Voter intent is determined in the first instance by language of the initiative. *Horwich v. Superior Court*, 21 Cal. 4th 272, 276 (1999). Arguments stated in the voter pamphlet may also be considered to determine voter intent. *Id.*, at 277-280 & n. 4.

The familiar rules of statutory construction thus apply in the initiative context. Analysis begins with the text of the initiative. The language should not be given a literal meaning if doing so would result in absurd consequences. *Horwich, supra*, at 276. Intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. *Ibid.* The Court must consider the object to be achieved and the evil to be prevented by the legislation. *Ibid.*

The language of Prop. 64 does not expressly state or unequivocally imply that the voters intended the initiative to apply to legitimate UCL actions pending for years prior to the election. The text is silent as to its

retroactive effect. The spirit of the initiative therefore controls the sense of the terms used in the measure.

The "findings" indicate that the voters did not intend to terminate legitimate UCL cases pending for many years prior to the election. The findings state that the UCL is "intended to protect California businesses and consumers form unlawful, unfair, and fraudulent business practices." EXH. "9", at 134. Interpreting the measure not to undermine bona fide cases raising significant issues (like the failure to pay overtime wages) under the UCL fully supports the voters' purpose to maintain the protections of the UCL for California consumers and businesses. Applying Prop. 64 to terminate cases raising serious issues of public concern weakens those protections.

The object to be achieved and the evil to be prevented is reflected in voters' ultimate intention to "eliminate *frivolous* unfair competition lawsuits." *Ibid*. As discussed above, this intention is emphatically proven by the single-minded focus in the ballot argument on "shakedown" lawsuits. Undermining this action does not address or prevent that evil. Instead, it would all but terminate a legitimate UCL action, seeking to obtain proper overtime wages for hundreds or thousands of Robinsons-May employees. "The voters should get what they enacted, not more and not less." *Hodges*, *supra*, 21 Cal. 4th at 114.

Prop. 64 was not enacted to protect defendants against meritorious and significant cases. A strong presumption exists against interpreting the measure to achieve this "absurd consequence." It is not only contrary to the solitary focus on "shakedown" lawsuits, but it is contrary to the interests of the voters themselves.

C. Irrespective Of Whether Proposition 64's Changes To The UCL Are Labeled "Substantive" Or "Procedural", The Changes Are Substantial And Preclude Retrospective Application.

The substantive-procedural distinction does not prevail in California because both "procedural" and "substantive" statutes are subject to the presumption against retroactive effect. *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal. 2d at 394-395; *Perry v. Heavenly Valley*, 163 Cal. App. 3d 495, 503 (1985); see *DiGenova v. State Board of Education*, 57 Cal. 2d 167, 173 (1962) (rule against retroactivity "is the same with respect to *all* statutes, and none of them is retroactive unless the Legislature has expressly so declared." (emphasis added)). And, in any event, "the distinction between 'substantive' and 'procedural' is a misdirection." *Russell v. Superior Court*, 185 Cal. App. 3d 810, 816 (1986). Instead, "the true distinction is not between 'substantive' or 'procedural' statutes, but between those affecting past transactions and those impacting only on future events." *Ibid.*

C.D.R. confirmed that the "procedural" versus "substantive" distinction is misplaced when considering whether a law applies retroactively:

> "In deciding whether the application of a law is prospective or retroactive, we look to function, not form. [Citations.] We consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies." (*Elsner v. Uveges*, *supra*, 34 Cal.4th at pp. 936-937.) The relevant question is whether the law substantially affects existing rights and obligations. (*Id.* at p. 937.)

C.D.R., *supra*, 126 Cal. App. 4th at 396. Stated another way, "it is the effect of the law, not its form or label, that is important, ***[and] what is determinative is the effect that application of the statute would have on substantive rights and liabilities***." *Tapia*, *supra*, at 289 (emphasis added).

Here, the changes imposed by Prop. 64 are profound:

> The disruption that would result from application of Proposition 64 to preexisting lawsuits should not be minimized. Plaintiffs who filed and prosecuted cases for years, like CDR, could suffer dismissal of their lawsuit at all stages of litigation.

C.D.R., *supra*, at 397. The "effect" that retroactive application of Prop. 64 would have on substantive rights and liabilities compels the construction that retroactive application is improper.

D. Denying Petitioners Leave To Amend Was An Unconstitutional Denial Of Their Due Process Rights.

After incorrectly holding that Prop. 64 applied retroactively to this action, the Trial Court compounded that error by denying Petitioners the right to amend their complaint to plead their UCL claim as a class action, rather than as a representative action. *See, Minsky v. City of Los Angeles*, 11 Cal. 3d. 113 (1974) (holding it is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that any defect can be cured by amendment). "The refusal to certify a class on other claims is not dispositive on whether the UCL claim should be certified, because the UCL claim is materially different from the other causes of action. Relief under the UCL is available without individualized proof of deception, reliance, and injury." *Corbett v. Superior Court*, 101 Cal. App. 4th 649, 672 (2002).

The denial of the right to amend underscored the unconstitutionality of the Trial Court's two, related Orders. When Petitioners were denied leave to amend, the retroactive application of Prop. 64 precluded all representational remedies, violating Petitioners' substantive due process rights.

1. The Trial Court Failed To Safeguard Petitioners' Due Process Rights By Allowing Them The Opportunity To Satisfy The New Class Requirements For A UCL Action.

A retrospective law is invalid if it conflicts with certain constitutional protections: (1) if it is an *ex post facto law*; (2) if it impairs the obligation of a contract; or, (3) if it, as here, deprives a person of a vested right or *substantially impairs* a right, thereby denying *due process.* *Roberts v. Wehmeyer*, 191 Cal. 601, 612 (1923); 7 B.E.WITKIN, SUMMARY OF CALIFORNIA LAW, CONSTITUTIONAL LAW § 486 (9th ed. 1988). Petitioners' right to state a representative UCL claim has been substantially impaired by the retrospective application of Prop. 64, thereby denying "due process" to Petitioners.

The Fourteenth Amendment to the federal Constitution provides that no state shall "deprive *any person* of life, liberty, or property, without due process of law." The California Constitution also contains due process guarantees. Art. I, §§ 7, 15; *People v. Ramirez*, 25 Cal. 3d 260, 265 (1979); *San Jose Police Officers Assn. v. San Jose*, 199 Cal. App. 3d 1471, 1478 (1988) [applying *Ramirez* analysis].

"[T]he phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular

situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 2158 (1981).

In its origin, the meaning of the term "due process" was *procedural*. The protection was against judicial or administrative procedure which, by reason of denial of notice and opportunity for a hearing, unfairly deprived a person of property or personal rights. But in its development in the United States, the Due Process Clause has been interpreted as a limitation upon the legislative as well as the judicial and executive branches of the government, thus preventing arbitrary and unreasonable legislation. This aspect of the subject is known as *substantive* due process.

Both *procedural* and *substantive* due process rights are impacted by the Trial Court's application of Prop. 64 to these proceedings. While a legislative modification to a statutory procedural remedy can, at times, be imposed upon pending court proceedings, a legislative change cannot, by a purported change in procedure, cut off all remedy. 7 B.E.WITKIN, SUMMARY OF CALIFORNIA LAW, CONSTITUTIONAL LAW § 493 (9th ed. 1988). Unless a statutory amendment leaves a reasonably efficient remedy in place to enforce the right, the right itself is affected, and the statute will be held invalid as an impairment of a *substantive* right. *See*, *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 876 (1939).

For example, when a *change* in statute is made retroactive, and cuts off an existing remedy without leaving time to exercise the remedy, then the retroactive application of that remedy is unconstitutional as to that party:

> "[W]here the change in remedy, as, for example, the shortening of a time limit provision, is made retroactive, there must be a reasonable time permitted for the party affected to avail himself of his remedy before the statute takes effect. If the statute operates immediately to cut off the existing remedy, or within so short a time as to give the party no reasonable opportunity to exercise his remedy, then the retroactive application of it is unconstitutional as to such party. [Citation.]" (*Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-123, 47 P.2d 716 [application of statutory amendment concerning dismissal for delay in prosecution to pending case was permissible where plaintiff had almost a year after amendment went into effect to bring case to trial].)

Santangelo v. Allstate Ins. Co., 65 Cal. App. 4th 804, 815 (1998). When due process rights are at issue, a Trial Court had no discretion when considering whether reasonable alternative remedies exist; rather, it is a question of law. Applying this mandate to a changed statute of limitation, one court said:

> "Whether there was reasonable time in these cases is *not a matter committed to the discretion of the trial court.* The question is one of constitutionality of the statute...." (*Rosefield Packing Co., supra,* 4 Cal.2d at p. 124, 47 P.2d 716, emphasis added.) What *Rosefield* means, in saying the issue of reasonable time is not committed to the trial court's discretion, is that the matter is a question of law.

Aronson v. Superior Court, 191 Cal. App. 3d 294, 297-298 (1987), citing

Liptak v. Diane Apartments, Inc., 109 Cal. App. 3d 762, 774 (1980) and *Eden v. Van Tine*, 83 Cal. App. 3d 879, 886 (1978).

Here, this Court struck Petitioners' representative remedy under the UCL. Doing so impaired Petitioners' substantive due process rights. When the Trial Court refused to permit Petitioners to amend their Second Amended Complaint to conform to the UCL, as amended, the Trial Court compounded that substantive violation of due process rights with a subsequent violation of Petitioners' procedural due process rights.

2. Leave To Amend Is Strongly Favored Under Established Judicial Policy.

Judicial policy strongly favors providing a forum for the complete resolution of all disputed matters between the parties in the same lawsuit. Thus, the court's discretion should be exercised *liberally* to *permit* amendment of the pleadings. See *Nestle v. Santa Monica*, 6 Cal. 3d 920, 939 (1972); *Mabie v. Hyatt*, 61 Cal. App. 4th 581, 596 (1998). The policy favoring amendment is so fundamental that its denial is rarely justifiable. *Morgan v. Sup.Ct.*, 172 Cal. App. 2d 527, 530 (1959) (emphasis added); see *Mabie, supra*, 61 Cal. App. 4th at 596.

This same liberal policy regarding amendment of pleadings applies when a court sustains a demurrer, or grants a motion to strike. As long as the defect is correctible, an amended pleading should be allowed. See

Grieves v. Sup.Ct. (Fox), 157 Cal. App. 3d 159, 168 (1984) – relying on CODE CIV. PROC. § 576 which authorizes court to allow amendment of pleadings at any time "in furtherance of justice"; *Price v. Dames & Moore*, 92 Cal. App. 4th 355, 360 (2001). In fact, it is an abuse of discretion for the court to deny leave to amend where there is any *reasonable possibility* that plaintiff can state a good cause of action. *Okun v. Sup.Ct. (Maple Properties)*, 29 Cal. 3d 442, 460 (1981); CODE CIV. PROC. § 472c(a); CODE CIV. PROC. § 472a(d); *Kolani v. Gluska*, 64 Cal. App. 4th 402, 412 (1998); *Vaccaro v. Kaiman*, 63 Cal. App. 4th 761, 768-769 (1998).

The Trial Court erred when it denied Petitioners leave to amend their Second Amended Complaint to state allegations consistent with the Trial Court's previous ruling on the retrospective application of Prop. 64.[19] Specifically, the Trial Court erred when it pre-determined the outcome of a future motion to certify Petitioners' UCL claim because: (1) a UCL claim is an independent cause of action, requiring separate analysis for certification purposes; and, (2) new authority from the California Supreme Court confirms the suitability of this matter for class treatment.

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[19] Again, Petitioners charged error with the Trial Court's decision to apply Prop. 64 retrospectively. Petitioners' Motion for Leave to Amend did not constitute their acquiescence in the Trial Court's decision. Rather, Petitioners' Motion was, effectively, an effort to "mitigate" the damage caused by the Trial Court's initial error.

3. Plaintiffs Were Never Obligated To Seek Certification Of Every Cause Of Action Asserted.

As a general principle of class actions, it is settled that a plaintiff need not seek to certify every cause of action in a complaint. Confirming this principle, the Fourth District Court of Appeal recently held that there is no rule requiring certification of all causes of action in a complaint:

> The Lebrillas point out Farmers is essentially asking us to hold a class cannot be certified anytime the class representative fails to seek certification of fewer than all causes of action. Of course there is currently no such rule. "To maintain a class action, the representative plaintiff must adequately represent and protect the interests of other members of the class. [Citation.]" (*City of San Jose v. Superior Court, supra,* 12 Cal.3d at p. 463, 115 Cal.Rptr. 797, 525 P.2d 701.) "When appropriate, an action may be maintained as a class action limited to particular issues." (Cal. Rules of Court, rule 1855(b); see also *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 471, 174 Cal.Rptr. 515, 629 P.2d 23.)

Lebrilla v. Farmers Group, Inc., 119 Cal. App. 4th 1070, 16 Cal. Rptr. 3d 25, 40-41 (4th Dist., 2004). Thus, under the UCL (pre-Prop. 64) and under the common law of class actions, Petitioners were justified in not seeking to certify their UCL claim. After the Trial Court erroneously imposed the Prop. 64 amendments on this matter, Petitioners should have been permitted to amend and seek certification of their UCL claim.

4. Before Prop. 64, Plaintiffs Were Not Obligated To Certify Their UCL Claim In Order To Prosecute A Representative Action.

> Both consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights. Class actions and representative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation and thereby encourage attorneys to undertake private enforcement actions. Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition.

Kraus, supra, 23 Cal.4th at 126. Prior to the amendments instituted by Prop. 64, representative actions under the UCL and class actions were viewed as separate and distinct methods of mass representation:

> As we explained in *People v. Superior Court (Jayhill), supra*, 9 Cal.3d 283, 107 Cal.Rptr. 192, 507 P.2d 1400, the trial court has authority to order restitution as a form of ancillary relief in such an injunctive action. Although an individual action may eliminate the potentially significant expense of pretrial certification and notice, and thus may frequently be a preferable procedure to a class action, the trial court may conclude that the adequacy of representation of all allegedly injured borrowers would best be assured if the case proceeded as a class action. Before exercising its discretion, the trial court must carefully weigh both the advantages and disadvantages of an individual action against the burdens and benefits of a class proceeding for the underlying suit.

Fletcher v. Security Pacific National Bank, 23 Cal. 3d 442, 453-454 (1979).

Under the prior formulation of the UCL, there was no obligation upon a plaintiff to seek certification of a UCL claim. In fact, as acknowledged by *Fletcher*, the representative UCL claim was still viewed as an *individual* action. The power of restitution, being a power of equity,

was available in any UCL case; a Court could fashion those orders necessary to compel disgorgement of what constituted ill-gotten gains from a defendant to the *individual* plaintiff and/or third-parties.

Stephen v. Enterprise Rent-A-Car, 235 Cal. App. 3d 806 (1991) does not support the Trial Court's refusal to permit Petitioners to amend their SAC. In *Stephen*, the plaintiff moved for class certification and was denied. Plaintiff did not appeal, and the decision became final. Six months later, plaintiff sought to *renew* the motion for class certification, based upon new facts (or theories predicated upon existing facts), but the plaintiff failed to timely move for reconsideration, under CODE CIV. PROC. § 1008. *Id.*, at 816-819. *Stephen*, then, stands for the principle that a slothful plaintiff cannot wait for the evidence to come to him. Here, Petitioners have been nothing but diligent in all aspects of this litigation. Now they merely request that, if Prop. 64 applies here, they be granted the opportunity to allege and prove the class action elements required for a representational form of action.

The initial motion for certification in this action did not address Petitioners' UCL claim, since Petitioners were not previously required by the UCL to certify a representative claim. When the Trial Court imposed new statutory requirements on this action, Petitioners should have had the opportunity to meet those requirements.

5. With Respect To Class Certification, Petitioners' UCL Claim Must Be Evaluated Independently From Petitioners' Other Causes Of Action.

a) **New Authority Issued By The California Supreme Court Confirms That The Prior Certification Motion In This Action Was Decided In Error.**

The California Supreme Court, in *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004), addressed the issue of manageability with respect to wage and hour cases, through an analysis of "predominance of common issues of law and fact." While *Sav-on* first concerned an appellate review of the granting of a Motion for Class Certification, the opinion also addresses how courts should, and can, manage multiple party plaintiff actions in the context of a claim for overtime compensation.

The argument advanced by Petitioners here is virtually identical to that advanced by the plaintiffs in *Sav-on*. *Sav-on*, s*upra*, at 325.

Here, Robinsons-May has taken the position that ASMs "manage" with respect to the following seven job duties: (1) Staff Scheduling; (2) Counseling Sales Associates; (3) Merchandise Presentation; (4) Sales Associates Performance Appraisals; (5) Interviewing potential Sales Associates; (6) Customer Service; and, (7) Shortages. As the Supreme

Court explained, these articulated duties will fall either on the "exempt" or the "non-exempt" side of the "ledger":

> On the one hand, each of the 51 declarations by the AM's and OM's describing their actual work (including specific tasks) that defendant submitted in opposing certification states that the declarant spends a majority of his or her time on managerial tasks. Plaintiffs characterize most of that same work as nonmanagerial. Regardless of who is correct, the fact is that the tasks discussed in both defendant's and plaintiffs' submissions comprise a reasonably definite and finite list. As plaintiffs argued to the trial court, "[t]he only difference between Defendant's declarations and Plaintiffs' evidence is that the parties disagree on whether certain identical work tasks are 'managerial' or 'non-managerial.' . . . this is an issue that can easily be resolved on a class-wide basis by assigning each task to one side of the 'ledger' and <u>makes the manageability of the case not the daunting task Defendant has sought to portray</u>." The trial court, in reaching its certification decision, agreed. [Emphasis added.]

Sav-on, supra, at 330-331.

In this matter, Petitioners will be able to easily demonstrate that policies and practices of Robinsons-May were systematically applied to all ASMs, and that the end result of that systematic application was that ASMs spent the vast majority of their workday on "non-exempt" tasks.

Sav-on also clarified the scope of the holding in *Ramirez v. Yosemite Water, Inc.*, 20 Cal. 4th 785 (1999). Under *Sav-on*, Robinsons-May's continued reliance upon *Ramirez* is misplaced. For instance, Robinsons-May argues that this case is not suitable for class treatment due to the need for individualized evidence regarding time spent on specific tasks. This

argument was addressed and dismissed by the *Sav-on* Court, which noted that:

> Defendant both misstates and overstates the significance of *Ramirez* . . .
>
> . . . . . .
>
> Any dispute over "how the employee actually spends his or her time" (*Ramirez, supra*, 20 Cal.4th at p. 802), of course, has the potential to generate individual issues. But considerations such as "the employer's realistic expectations" (*ibid*.) and "the actual overall requirements of the job" (*ibid*.) are likely to prove susceptible of common proof. Defendant's "realistic expectations," in particular, may become relevant in this case, and a reasonable court could conclude these are susceptible to common proof.

Sav-on, supra, at 335-337. In short, after clarification by the *Sav-on* Court, *Ramirez* no longer has the significance attached to it by Robinsons-May, and *Ramirez* was improperly relied upon as a primary basis for denying Petitioners' initial motion for certification.

Under virtually identical facts, the *Sav-on* Court has determined that wage and hour cases such as the instant matter are suitable for class treatment. As such, it is not just plausible, it is likely, that Petitioners can successfully allege *and* certify a UCL class action.

b) **UCL Claims Are Independent Causes Of Action Requiring An Independent Analysis Of Their Suitability For Class Treatment.**

The refusal to certify a class on other claims is not dispositive of whether the UCL claim should be certified, because the UCL claim is

materially different from the other causes of action. *Corbett v. Superior Court*, 101 Cal. App. 4th 649, 672 (2002). In particular, proof of a UCL claim only requires a showing that a defendant's conduct is "unlawful, unfair, deceptive, untrue, or misleading". *Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1144 (2001).[20]

A UCL claim is not another type of tort. For example, the California Supreme Court recently confirmed that individualized proof of knowledge is not required under the UCL:

> In addition, "to state a claim under the act one need not plead and prove the element of a tort. Instead, one need only show that 'members of the public are likely to be deceived.' [Citation.]" (*Bank of the West, supra*, 2 Cal.4th at p. 1267, 10 Cal.Rptr.2d 538, 833 P.2d 545; see also *Fletcher, supra*, 23 Cal.3d at p. 453, 153 Cal.Rptr. 28, 591 P.2d 51 [individual plaintiff's knowledge of the unfair practice not needed in order to recover restitution].)

Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1151 (2003). The *Korea Supply* Court went on to observe that the broad liability imposed by the UCL, and the simplified proof required at trial, was balanced by the limited relief available. *Korea Supply*, *supra*, at 1152.

Here, Petitioners' UCL claim will require simple proof that differs

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[20] The only relevant changes imposed by Prop. 64 are the standing and direct injury requirements for plaintiffs. The elements of a UCL violation remain the same, and, in this action, Plaintiffs need only show that Defendant RM's employment practices with respect to "exempt" classification are "unlawful, unfair, deceptive, untrue, or misleading".

from Petitioners' other claims. That simple proof will focus on Defendant's uniform conduct and not upon any purported or slight variation between ASMs. Because the Trial Court has not yet determined whether Petitioners' UCL claim is suitable for class treatment after suitable briefing, it was error to make that determination *a priori*.

E. Delayed Review By Appeal Is An Inadequate Remedy And Would Result In Irreparable Harm To The Parties And The Judicial System.

1. The Issues Presented In This Writ Are Purely Legal And Impact Numerous Cases Pending Throughout The State.

The question of whether Prop. 64 applies retroactively is a pure question of law affecting many cases throughout California. Even the constitutional question of whether Petitioners posses any sufficient alternative remedies does not raise a question of fact; instead, it is a question of law that leaves no room for discretionary judgment. *Aronson, supra*, 191 Cal. App. 3d at 297-298.

2. Writ Relief Is Essential To Prevent Multiple Retrials In This And Numerous Other Cases Throughout The State.

The Trial Court has deprived Petitioners of their representative claims and denied Petitioners the opportunity for hearing as to whether they can maintain a UCL class action. Without immediate review, Petitioners will be forced to try their case and then, after an appeal, return not just to square one at trial, but to *pre-trial* class certification (assuming that Prop. 64 is ultimately determined to apply retroactively by the California Supreme Court). In other words, without immediate intervention by this Court, Petitioners could move backwards from a trial to pre-trial motion practice, after enduring the significant delay occasioned by an appeal.

Even if Prop. 64 is found to apply prospectively only, Petitioners will endure two trials, and the several thousand impacted ASMs will be that much harder to locate for a second trial and subsequent restitution order.

Either result would be profoundly damaging to Petitioners and wasteful of the time and resources of all affected, including the Trial Court. This Court must intervene to: (1) correct the dual errors of the Trial Court; (2) answer a pivotal question of first impression (if necessary); and, (3) prevent a gross miscarriage of justice that would result if Petitioners are forced to try their two individual cases and then appeal the amendment and class pleading issue thereafter.

3. These Issues Will Not Go Away.

This Division of the Fourth Appellate District has not yet issued a decision on the issue of whether Prop. 64 applies retroactively to cases filed prior to its passage. As conflicting decisions are issued by the various Courts of Appeal, defendants throughout the state will pick and choose from these decisions to attack cases that stated valid UCL claims when filed. Trial Courts will be forced to select between conflicting decisions that are, thus far, incomplete in their analysis. Given the controlling authority provided by GOVT. CODE § 9605, this Court should end this fracture in the law and provide clear guidance to trial courts assessing whether Prop. 64 applies retroactively.

V.

CONCLUSION

The amendments to the UCL enacted by Prop. 64 do not apply to pending cases: (1) Govt. Code § 9605 mandates that statutory amendments shall not be construed as repeals, which defeats the "statutory repeal" rule relied upon by the Trial Court; (2) Prop. 64 lacks an express declaration of retroactive intent; and (3) without an expression of retroactive intent, the presumption of prospectivity governs.

If, however, this Court concludes, despite the foregoing, that Prop.

64 applies to this action, then, as a matter of fundamental fairness and constitutional right, Petitioners should be permitted to amend their complaint to allege class allegations, as required by Prop. 64.

While this Court considers this Petition, Petitioners request that this Court immediately stay the action in the Trial Court to prevent undue prejudice to Petitioners that would result otherwise.

Dated: March 15, 2005.

Respectfully submitted,

ARIAS, OZZELLO & GIGNAC, LLP

By: 

MIKE ARIAS
MARK OZZELLO
H. SCOTT LEVIANT
Attorneys for Plaintiffs

VERIFICATION AND DECLARATION OF

H. SCOTT LEVIANT

I, H. Scott Leviant, declare as follows:

1. I am a fully qualified, adult resident of the State of California, and, if called as a witness herein, I would testify fully to the matters set forth herein. All of the matters set forth herein are within my personal knowledge, except those matters that are stated to be upon information and belief. As to such matters, I believe them to be true.

2. I am employed as an attorney at the law firm of ARIAS, OZZELLO & GIGNAC, LLP. I have been assigned as one of the attorneys with primary responsibility for this matter. I am admitted, in good standing, to practice as an attorney in the State of California, the United States District Courts for the Central, Northern and Southern Districts of California and the Ninth Circuit Court of Appeals, and have never been subject to discipline by the State Bar of California.

3. I have read the Petition for Writ of Mandate or Other Extraordinary Relief to which this Verification and Declaration are attached. I declare, of my own personal knowledge, that the facts set forth therein are true and correct and that the accompanying documents are true and correct.

4. A true and correct copy of the Trial Court's January 21, 2005

Order is included as Exhibit "1" in Petitioners' concurrently filed Exhibits to Petition For Peremptory Or Alternative Writ Of Mandate.

5. A true and correct copy of the transcript of proceedings held before the Trial Court on January 4, 2005 is included as Exhibit "2" in Petitioners' concurrently filed Exhibits to Petition For Peremptory Or Alternative Writ Of Mandate.

6. A true and correct copy of the Trial Court's February 7, 2005 Order is included as Exhibit "3" in Petitioners' concurrently filed Exhibits to Petition For Peremptory Or Alternative Writ Of Mandate.

7. A true and correct copy of the transcript of proceedings held before the Trial Court on January 25, 2005 is included as Exhibit "4" in Petitioners' concurrently filed Exhibits to Petition For Peremptory Or Alternative Writ Of Mandate.

8. A true and correct copy of Petitioners' Opposition To Defendant's Motion For Judgment On The Pleadings Or, In The Alternative, To Strike Plaintiffs' Representative Allegations is included as Exhibit "5" in Petitioners' concurrently filed Exhibits to Petition For Peremptory Or Alternative Writ Of Mandate.

9. A true and correct copy of Declaration Of H. Scott Leviant In Support Of Plaintiffs' Opposition To Defendant's Motion For Judgment On The Pleadings Or, In The Alternative, To Strike Plaintiffs' Representative Allegations is included as Exhibit "6" in Petitioners'

concurrently filed Exhibits to Petition For Peremptory Or Alternative Writ Of Mandate.

10. A true and correct copy of Petitioners' Motion For Leave To File Third Amended Complaint is included as Exhibit "7" in Petitioners' concurrently filed Exhibits to Petition For Peremptory Or Alternative Writ Of Mandate.

11. A true and correct copy of Petitioners' Reply In Support Of Plaintiffs' Motion For Leave To File Third Amended Complaint is included as Exhibit "8" in Petitioners' concurrently filed Exhibits to Petition For Peremptory Or Alternative Writ Of Mandate.

12. A true and correct copy of the text of Prop. 64 is included as Exhibit "9" in Petitioners' concurrently filed Exhibits to Petition For Peremptory Or Alternative Writ Of Mandate.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed by me on this 15th day of March 2005, at Los Angeles, California.

H. Scott Leviant, "Declarant"

CERTIFICATION

Line Spacing: Respondents' Brief was double spaced, except for indented quotations and footnotes, which were all single spaced.

Typeface and Size: The typeface selected for this Brief is 13 point Times New Roman. The font used in the preparation of this Brief is proportionately spaced.

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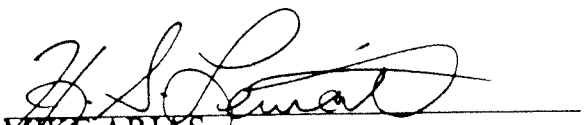
Dated: March 15, 2005.

Respectfully submitted,

ARIAS, OZZELLO & GIGNAC, LLP

By: 

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