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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WEBSTER BIVENS, Plaintiff and Appellant, v. COREL CORPORATION, Defendant and Respondent.	D043407 (Super. Ct. No. GIC 802976)

APPEAL from a judgment of the Superior Court of San Diego County, Wayne L. Peterson, Judge. Affirmed.

The McMillan Law Firm, Scott A. McMillan, Michelle D. Volk and David J. Lola for Plaintiff and Appellant.

Gray Cary Ware & Freidenrich, DLA Piper Rudnick Gray Cary, Terry D. Ross and Kristina M. Hoy for Defendant and Respondent.

I.

INTRODUCTION

Plaintiff Webster Bivens (Bivens) appeals from the trial court's judgment in favor of defendant Corel Corporation (Corel). Corel offered consumers cash-back rebates for purchasing its software. Bivens filed an action against Corel claiming that Corel imposed conditions not disclosed in the rebate offers and that Corel never intended to satisfy customer requests for the rebates. The trial court granted summary judgment in favor of Corel. Bivens contends that the trial court erred in granting Corel's motion for summary judgment, arguing that there remain material facts in dispute. We conclude that no triable issue of material fact exists and that Corel is entitled to summary judgment on Bivens's claims.

While Bivens's appeal was pending, the voters of California passed Proposition 64 (Prop. 64), a measure that amended certain provisions of California's Unfair Competition Law (UCL), set forth at Business and Professions Code[1] section 17200 et seq. In view of Prop. 64's passage, we requested that the parties submit supplemental briefs addressing whether or not Prop. 64 applies to this case and, if so, what impact, if any, Prop. 64's amendments to the UCL have on this case. We conclude that Prop. 64's amendment of section 17204 (see § 17204, as amended by Prop. 64, as approved by voters, Gen. Elec.

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1 Further statutory references are to the Business and Professions Code unless otherwise indicated.

(Nov. 2, 2004).)[2] does apply to this case, and requires that we affirm the trial court's judgment in favor of Corel on the additional ground that Bivens no longer has standing to prosecute the claims he raises in the complaint.

II.

FACTUAL AND PROCEDURAL HISTORY

A. *Background*

Between 2001 and 2003, Corel distributed to retailers Corel WordPerfect Family Pack 3 (Corel 3) and Corel WordPerfect Family Pack 4 (Corel 4) software packages that offered "cash back" mail-in rebates. On the boxes containing Corel 3 software was a preprinted offer for a mail-in rebate in the amount of $30. The boxes containing Corel 4 software offered a mail-in rebate in the amount of $20.

1. *The Corel 3 rebate offer*

The offer printed in the upper right-hand corner of the front of the Corel 3 package stated "Get $30 US/$50 Cdn cash back!" Directly underneath, in smaller print, was the statement, "See inside for details." Inside each Corel 3 package there was a rebate form that listed the details of the rebate offer. The details for eligibility to receive the advertised rebate included the following language:

> "To receive your $30 US/$50 Cdn rebate:
>
> "Buy WordPerfect Family Pack 3 between July 1, 2001 and December 31, 2002

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[2] Further references to section 17204 are to section 17204 as amended by Prop. 64, as approved by voters, General Election (November 2, 2004) unless otherwise indicated.

"Complete this form and mail it along with the original UPC bar code from the box and the original receipt (or a legible photocopy of the original receipt) from the above product to:

"[¶] . . . [¶]

"This promotion does not apply to OEM, downloadable or NFR versions of WordPerfect Family Pack 3 or to the Corel License Program

"To qualify, your redemption form must be received on or before January 30, 2003

"Allow up to 10 weeks to receive your rebate check

"Limit of one (1) rebate per name or household

"This offer is valid only in the United States and Canada

"This promotion is void where prohibited or restricted by law

"Corel is not responsible for lost, destroyed, misdirected, postage due or delayed mail, or for any incorrect information provided to Corel by the customer

"This offer cannot be combined with any other promotions

"Rebate will be issued in the currency in which the product was purchased"

2. *The Corel 4 rebate offer*

The offer printed on the Corel 4 package stated "GET $20 US/$30 Cdn CASH BACK!" in the upper right-hand corner of the front of the box. Directly underneath, in smaller print, was the statement: "SEE INSIDE FOR DETAILS." Inside each Corel 4 package there was a rebate form that listed the details of the rebate offer. The details for eligibility to receive the advertised rebate included the following language:

"To receive your $20 US/$30 Cdn rebate:

"You must have bought WordPerfect Family Pack 4 between July 1, 2002 and Dec. 31, 2003 and received this coupon with purchase

"Complete this form and mail it, along with the original UPC bar code from the box and the original receipt (or a legible photocopy of the original receipt) from the above product, to:

"[¶] . . . [¶]

"This promotion does not apply to Academic, OEM, NFR or download versions of WordPerfect Family Pack 4, or to the Corel License Program

"To qualify, your redemption form must be received on or before Jan. 30, 2004

"Allow up to 10 weeks to receive your rebate check

"Limit of one (1) rebate per name, household or corporation

"This offer is valid only in the United States and Canada

"This promotion is void where prohibited or restricted by law

"Corel is not responsible for lost, destroyed, misdirected, postage due or delayed mail, or for any other matter arising as a result of incorrect information provided to Corel by the customer

"This offer cannot be combined with any other promotions

"Rebate will be issued in the currency in which the product was purchased"

3. *TCA Fulfillment Services, Inc.*

Corel contracted with TCA Fulfillment Services, Inc. (TCA) to process consumer applications for Corel 3 and Corel 4 rebates. As of June 16, 2003, a total of 17,981 Corel 3 rebates had been paid to United States purchasers. Another 30 rebate requests were being processed. A total of 3,322 Corel 3 rebate requests had been initially denied;

however, 316 of these requests were later approved and paid, or were being reprocessed for payment.

As of June 16, 2003, 10,540 United States Corel 4 rebates had been paid. TCA was processing 608. An additional 1,452 rebate requests had been initially denied; 123 of those requests were later approved or were being reprocessed for payment.

B. *Bivens's complaint and allegations*

Bivens, who had neither purchased the Corel software nor applied for a rebate, initiated this lawsuit against Corel on December 30, 2002, by filing a complaint on behalf of the general public pursuant to sections 17204 and 17535. Bivens alleged that Corel's conduct in advertising a cash-back rebate offer on the outside of packages of Corel 3 and Corel 4 with the words "Details Inside," and providing the material terms of the offer on a rebate form contained inside the Corel 3 and Corel 4 packages violated sections 17537.11, 17500, and 17200. Bivens sought a declaration that Corel's failure to fulfill every rebate request made by a purchaser was unlawful and unfair, constituted a breach of contract with consumers, and provided Corel with an unfair competitive advantage over its competitors. Bivens further sought an accounting to determine the dollar amount of the rebate requests that were allegedly unlawfully not paid, disgorgement and restitution of such funds to purchasers, escheatment of disgorged profits belonging to unidentified victims to the State of California pursuant to Civil Code section 1519.5, preliminary and permanent injunctive relief, and attorney fees and costs of suit.

C. *Trial court proceedings*

1. *Motion for summary judgment*

Corel filed a motion for summary judgment on June 27, 2003. A hearing on the motion was scheduled for September 12. On July 24, Bivens served Corel with requests for discovery, including form and special interrogatories, requests for admissions, and a request for production of documents. Prior to serving these discovery requests, Bivens had not conducted any discovery in this case since filing the complaint on December 30, 2002.

Through a series of motions and ex parte applications, Bivens requested an extension of time to file an opposition to Corel's motion for summary judgment and requested that the hearing on the motion be continued so that Bivens could obtain responses to the discovery he propounded on July 24. The trial court eventually granted Bivens a one-week extension to file his opposition. However, the court denied his requests to continue the hearing date. On September 2, Bivens's counsel filed his opposition to Corel's summary judgment motion and also filed a document entitled "Renewal of Motion for Continuance."

2. *Attorney McMillan's declaration regarding his rebate requests*

In support of his opposition to Corel's motion for summary judgment, Bivens submitted the declaration of his counsel, Scott McMillan. According to the declaration, Attorney McMillan personally purchased two Corel 3 packages from Office Depot in a single transaction on August 24, 2002. One package was for himself and one was for his law corporation. McMillan submitted rebate request forms for the two Corel 3 purchases.

Corel did not send McMillan the rebates he requested. McMillan admitted that the Corel 3 packages he purchased were on sale at the time he bought them and that he had used coupons in making the purchase.

McMillan also purchased Corel 4 from Amazon.com. In addition to submitting a Corel 4 rebate request form to TCA, McMillan applied for and received a $40 rebate on his Corel 4 purchase directly from Amazon.com. According to McMillan's declaration, the Corel 4 rebate request he submitted to TCA was initially denied. When he did not receive the $20 rebate from Corel, he placed a telephone call to TCA regarding his Corel 4 rebate request. In response to McMillan's call, TCA sent him a rebate check in the amount of $30.

3. *Summary judgment hearing and disposition*

The trial court heard Bivens's "renewed" motion for a continuance and Corel's summary judgment motion on September 12, 2003. The court took both matters under submission.

On September 19, the court denied Bivens's request to continue the summary judgment motion by minute order, concluding that Bivens had failed to establish that responses to the discovery he sought could defeat summary judgment, and also on the ground that Bivens had failed to provide sufficient reasons why he could not have obtained the information he believed could defeat summary judgment earlier in the proceedings. The trial court also granted Corel's motion for summary judgment. In its order, the court addressed a number of other outstanding issues, including evidentiary objections to the declarations the parties had submitted. The court sustained Corel's

objections to the McMillan declaration, and overruled Bivens's objections to the declaration of Frank Giordano, president of TCA.

The court entered judgment in favor of Corel on November 7, 2003. Bivens filed a notice of appeal on December 3, 2003.[3]

III.

DISCUSSION

A. *As an unaffected plaintiff, Bivens lacks standing to pursue section 17200 claims against Corel*

Because the question whether the newly amended version of section 17204 applies to this case is dispositive, we address it before addressing the merits of the action.

1. *Proposition 64*

On November 2, 2004, California voters approved Prop. 64. Prop. 64 became effective the following day, pursuant to article II, section 10, subdivision (a) of the California Constitution.

Prop. 64 amends certain provisions of the UCL, set forth at section 17200 et seq. (See § 17204.) As is relevant to the instant case, Prop. 64 amended section 17204 to require that actions filed by private persons pursuant to the UCL be brought only by plaintiffs who have suffered an injury-in-fact. Prior to Prop. 64's passage, section 17204 provided in pertinent part:

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[3] On June 29, 2004, Bivens filed a request for judicial notice in support of his opening brief. We grant Bivens's unopposed request to take judicial notice of certain Federal Trade Commission policy statements and portions of the legislative history of Assembly Bill 1231.

> "Actions for any relief pursuant to this chapter shall be prosecuted exclusively . . . by . . . or upon the complaint of any board, officer, person, corporation or association *or by any person acting for the interests of itself, its members or the general public*." (Italics added.)

As amended, section 17204 now reads in pertinent part:

> "Actions for any relief pursuant to this chapter shall be prosecuted exclusively . . . by . . . or upon the complaint of any board, officer, person, corporation or association *or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition*." (§ 17204.) (Italics added.)

The statute, as amended, prevents unaffected plaintiffs from being able to file actions on behalf of the general public. Under current law, only persons who have been injured by the business practices complained of have standing to bring an action for relief under the UCL.

After the voters approved Prop. 64, we requested that the parties in this case address the following questions:

1. Does Proposition 64 apply to cases that were filed before the effective date of the new law?

2. Assuming Proposition 64 does apply to pending cases, what is the impact, if any, of the provisions of Proposition 64 on this case?

2. *Prop. 64 applies to this case, and divests Bivens of standing to prosecute this lawsuit*

Bivens filed this action against Corel in 2002, almost two years before Prop. 64 was enacted. Although the trial court entered judgment in favor of Corel, "a judgment does not become final so long as the action in which it is entered remains pending [citation] and an action remains pending until final determination on appeal [citation]."

(*County of San Bernardino v. Ranger Ins. Co*. (1995) 34 Cal.App.4th 1140, 1149 (*County of San Bernandino*).) Therefore we must consider whether the newly amended version of the UCL applies to this case, which was filed prior to Prop. 64's approval by the voters but was still pending at the time Prop. 64 became effective.

Courts generally presume that a newly enacted statute does not have retrospective effect unless there has been some clearly expressed contrary intent. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282.) However, although courts normally construe statutes to operate prospectively rather than retrospectively, courts also generally hold that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, "a repeal of [the statute] without a saving clause will terminate all pending actions based thereon." (*Southern Service Co., Ltd. v. Los Angeles County* (1940) 15 Cal.2d 1, 11-12; see also *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829-831 (*Mann*); *Krause v. Rarity* (1930) 210 Cal. 644, 652-653 (*Krause*).) This is because a court must "apply the law in force at the time of the decision" when a remedial statute is repealed prior to final judgment being entered in a case. (*Brenton v. Metabolife Int'l, Inc.* (2004) 116 Cal.App.4th 679, 690.)

"'The justification for this rule is that all statutory remedies are pursued with full realization that the [L]egislature may abolish the right to recover at any time.' [Citation.]" (*Mann*, *supra*, 18 Cal.3d at p. 829; see also Govt. Code, § 9606 ["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"].) This is because "a party's rights and remedies under [a] . . . statute may be enforced after repeal only

where such rights have vested before repeal" (*County of San Bernardino, supra,* 34 Cal.App.4th at p. 1149), and unlike a common law right, "[a] statutory remedy does not vest until final judgment" (*South Coast Regional Com. v. Gordon* (1978) 84 Cal.App.3d 612, 619). If the statutory right to recover has not vested through the entry of final judgment by the time of the repeal, the right remains inchoate, incomplete, or unperfected, and the repeal operates to extinguish the right at the time the repeal is enacted. (*People v. One 1953 Buick 2-Door* (1962) 57 Cal.2d 358, 365 (*One 1953 Buick 2-Door*).)

Bivens's right to state a claim against Corel was not based on common law rights, but, rather, depended wholly upon provisions of the UCL. Prop. 64 effectively repealed the portion of the UCL that granted standing to Bivens and to other private persons who had not themselves suffered injury as a result of the allegedly unfair, unlawful or fraudulent business practices complained of in the lawsuit. (See § 17204.) Although Prop. 64 did not act to entirely repeal any of the UCL's causes of action,[4] its repeal of unaffected plaintiff standing is sufficient to completely extinguish Bivens's right to bring

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4 Most of the cases involving the immediate effect of the repeal of a remedial statute involve the repeal of the entire cause of action, such that a defendant's conduct previously made unlawful by statute is no longer actionable at all. (See, e.g., *Southern Service Co., Ltd., supra*, 15 Cal.2d at pp. 11-12; see also *Mann, supra*, 18 Cal.3d at pp. 829-831; *Krause, supra*, 210 Cal. at pp. 652-653.) This is not the case with Prop. 64. Although Prop. 64 repealed the UCL's broad standing provisions, which allowed any private citizen or group to prosecute an action on behalf of the general public for conduct made unlawful under the UCL, Prop. 64 did not render that conduct unactionable; it left intact the provisions creating causes of action against defendants for allegedly unlawful, unfair, or fraudulent business practices.

his claims. We reach this conclusion because insofar as Prop. 64 completely eliminates the right of uninjured individuals to pursue a remedy under the UCL, its amendment of section 17204 entirely repeals a statutory right previously held by one class of individuals. Further, Prop. 64 contains no savings clause to exclude from its reach cases filed prior to its effective date. Without a savings clause, Prop. 64's repeal of unaffected plaintiffs' statutory authorization to pursue UCL claims is effective immediately.

We recognize that in *Californians For Disability Rights v. Mervyn's, LLC* (Feb. 1, 2005, A106199) ___Cal.App.4th ___ [2005 WL 230019] (*Californians For Disability Rights*), the Court of Appeal held that Prop. 64 does not apply to cases filed prior to the effective date of the new law. In rejecting the argument that the statutory repeal doctrine rendered Prop. 64 applicable to pending cases, the *Californians For Disability Rights* court relied on the California Supreme Court's decision in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 (*Evangelatos*). (*Californians For Disability Rights, supra,* ____ Cal.App.4th ____ [2005 WL 230019], *4, citing *Evangelatos*, *supra*, 44 Cal.3d at pp. 1222-1224.) In our view, *Evangelatos* is inapposite to the question whether to apply Prop. 64 to pending cases because the Proposition at issue in that case did not repeal a *statutory* right, as Prop. 64 did, but rather modified a *common law* right.

In *Evangelatos,* the Supreme Court held that Proposition 51, "which modified the traditional, *common law* 'joint and several liability' doctrine," did not apply to causes of action that had accrued before the effective date of the new law. (*Evangelatos, supra,* 44 Cal.3d at pp. 1192-1194, italics added.) However, the *Evangelatos* court did not address,

much less overrule, any of the numerous cases in which the Supreme Court held that a repeal of a *statutory* right applies to pending cases (*e.g., Mann, supra,* 18 Cal.3d at pp. 829-830). Further, courts in many cases decided both before and after *Evangelatos*, have repeatedly emphasized that a statute that repeals a *statutory* right, unlike a statute that modifies a *common law* right, applies to pending cases. (E.g., *One 1953 Buick 2-Door*, *supra*, 57 Cal.2d at p. 365; *Physicians Committee For Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 125 [applying the statutory repeal doctrine and distinguishing *Evangelatos* on this ground].) Accordingly, *Evangelatos* is not on point and, for the reasons set forth above, we decline to follow *Californians For Disability Rights.*

There is now no statutory authorization granting Bivens standing to prosecute the UCL claims raised in this case. The requirement of standing must be satisfied throughout the entire action, not just upon the filing of an action. (See *Common Cause of California v. Board of Supervisors* (1989) 49 Cal.3d 432, 438.) Because lack of standing is considered a jurisdictional defect that may not be waived, Bivens's lack of standing requires that the action be dismissed unless the complaint can be amended by substituting a party who has standing to sue for Bivens.[5] (See *Cloud v. Northrop Grumman Corp*.

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5 Bivens cannot remedy the defect of his lack of standing by simply amending the pleadings to allege that he meets the requirements of section 17204. Bivens admits in his complaint that he is an unaffected plaintiff. Amending his complaint to plead otherwise would directly conflict with this admission and therefore would not allow him avoid the defect in standing. (See *Freeman v. San Diego Ass'n of Realtors* (1999) 77 Cal.App.4th 171, 178, fn. 3 [party may not avoid defects in pleading by omitting defective facts or alleging facts inconsistent with those alleged in earlier pleadings].) Further, in this case,

(1998) 67 Cal.App.4th 995, 1005-1006 [Code of Civil Procedure section 473 must be liberally construed to permit amendment to substitute plaintiff with standing for one who is not real party in interest]; see also *Klopstock v. Superior Court of San Francisco* (1941) 17 Cal.2d 13, 20 [amendment to substitute real party in interest as plaintiff entitled to relation-back effect so long as cause of action against defendant is not factually changed such that wholly different cause of action is introduced].) Thus, even if Bivens's action was meritorious, which we conclude it is not (see part B, *post*), Bivens could not pursue it because he lacks standing.

Because Prop. 64 effectively repealed one portion of a remedial statute, the application of the newly amended provision of section 17204 to this pending case does not implicate concerns about retroactive or prospective application of the law. Bivens's statutory right to pursue this case had not yet vested at the time Prop. 64 repealed that right, and because Bivens's standing was an "inchoate, incomplete, or unperfected" right, the repeal operated to extinguish his standing as soon as it was enacted. (See *One 1953 Buick 2-Door, supra,* 57 Cal.2d at p. 365.) Thus, we must apply the requirements of the law as it stands today to the case before us. (*Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489 ["[I]f the judgment is not yet final because it is on appeal, the appellate court has a duty to apply the law as it exists when the appellate court renders its decision]".)

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the complaint cannot be amended to substitute in a real party in interest because, as we conclude, *post*, Corel is entitled to summary judgment on the claims raised in the complaint. (See part B, *post*.) Because the claims raised in the complaint fail as a matter of law, there remain no claims for a new plaintiff to pursue.

Because the statute, as it stands today, does not allow an uninjured individual to pursue UCL claims against a defendant on behalf of the general public, as of today Bivens lacks standing to pursue the claims he asserts in this lawsuit. (See *Branick v. Downey Savings & Loan Assn.* (Feb. 9, 2005, B172981) _____Cal.App.4th_____ [2005 Cal.App. Lexis 201, *25]; accord, *Benson v. Kwikset Corp.* (Feb. 10, 2005, G030956) ____Cal.App.4th____ [2005 Cal.App. Lexis 208, *16-*17].)

B. *Corel is entitled to summary judgment on the merits of this case*

Even if Bivens had standing to pursue this action, we conclude that the trial court properly granted Corel's motion for summary judgment because Bivens has not met his burden of establishing that any triable issue of material fact exists.[6]

1. *Standards governing summary judgment*

Summary judgment is proper when "all the papers submitted show there is no triable issue as to any material fact" such that "the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., §437c, subd. (c).) A defendant moving for summary judgment must establish that he has "met his burden of showing that a cause of action . . . cannot be established." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

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6 Even though it may be possible under other circumstances to amend a complaint to substitute in a plaintiff who does have standing, in this situation, even if a new plaintiff were to be substituted in for Bivens, that plaintiff could not prevail on these claims. Therefore, allowing amendment of this complaint to substitute a new plaintiff would be improper.

" 'In evaluating the correctness of a ruling under [Code of Civil Procedure] section 437c, we must independently review the record before the trial court. Because the grant or denial of a motion under [Code of Civil Procedure] section 437c involves pure questions of law, we are required to reassess the legal significance and effect of the papers presented by the parties in connection with the motion. [Citation.]' [Citation.]" (*Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.* (1996) 49 Cal.App.4th 1397, 1408.)

The parties agree that on review of the trial court's order, this court must apply the same analysis that the trial court applied in determining the merits of Corel's motion for summary judgment. "In reviewing an order on a summary judgment, the reviewing court employs the same process as the trial court in determining whether, as a matter of law, summary judgment was appropriate." (*Saldana v. Globe-Weis* (1991) 233 Cal.App.3d 1505, 1513.)

2. *Corel made a prima facie showing that it was entitled to summary judgment*

Bivens contends that the trial court's judgment must be reversed because Corel failed to make a prima facie showing that it was entitled to summary judgment. For the following reasons, we disagree.

a. *Corel established that its rebate offers did not violate sections 17200 or 17500 in the manner alleged in Bivens's complaint*

Bivens alleges that the rebate offers printed on the front of the Corel 3 and Corel 4 packages stating "Get . . . cash back" were false and misleading, thus violating sections

17200 and 17500. Specifically, Bivens maintains that the rebate offers were misleading because they failed to disclose all of the material terms of the rebate offers.

Section 17500 prohibits anyone from making statements that are untrue or misleading, and that are known, or by the exercise of reasonable care should be known, to be untrue or misleading, in order to induce consumers into purchasing property or services.[7] Section 17200 prohibits any unlawful, unfair, or fraudulent business acts or practices, including deceptive or misleading advertising prohibited pursuant to section 17500.[8]

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[7] Section 17500 provides in pertinent part: "It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. . . ."

[8] Section 17200 provides in pertinent part: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

In order to prevail on any claim under these statutory provisions, Bivens would have to show that Corel's rebate offer was untrue or misleading. Thus, in order to prevail on its motion for summary judgment, Corel had to make a prima facie showing that its rebate offer was neither untrue nor misleading. Corel met its burden. We conclude that Corel's mail-in rebate offers for Corel 3 and Corel 4 were neither false nor misleading in that Corel disclosed the material terms of the offers on the rebate forms inside the packages, and it imposed only those terms in processing rebate requests.

(i) *Corel made a prima facie showing that its rebate offers were not false*

Bivens contends that Corel's rebate offers for "cash back" were untrue and/or misleading because not all purchasers of Corel 3 and Corel 4 actually received cash back. Bivens claims that while Corel advertised that it "would send rebate payments to consumers who purchased its product," Corel would actually send rebate payments only to those consumers who purchased its products *and* were eligible to receive the rebate as a result of complying with the terms of the offer. In making this argument, Bivens fails to acknowledge that Corel did not make a blanket offer that anyone who purchased Corel 3 or Corel 4 could get cash back. Rather, Corel's rebate offer included certain restrictions—restrictions that were detailed, as the product package indicated, on a document contained inside the package.

On the rebate forms enclosed within the Corel 3 and Corel 4 packages, Corel disclosed to purchasers that they would have to meet a number of requirements in order to be eligible to receive the advertised rebate. Those purchasers who did not meet the

requirements would not receive a rebate. Thus, Corel's rebate offer was not simply "Get . . . cash back," but, rather, encompassed all of the following: The statement "Get . . . cash back"; the statement "See inside for details"; and the terms and restrictions outlined on the rebate form.

Bivens also alleged that Corel "did not intend to fulfill [its] promises to pay the specified rebates" because it "impos[ed] additional undisclosed restrictions on the consumers" that allowed it to avoid satisfying the rebate claims from otherwise eligible consumers. Specifically, Bivens complained that Corel failed to inform consumers that multiple purchases evidenced on the same receipt would not be eligible for the rebate. Bivens complained:

> "The fact that the responding consumer would not receive the rebate if another responding consumer also purchased COREL 3 and paid for the product during the same transaction and submitted the same receipt, is a material term, and as such should have been disclosed in the advertisement and the rebate offer."

In response to these allegations, Corel was required to make a prima facie showing in its motion for summary judgment that it did not impose additional undisclosed restrictions that were not set forth on the outside of the package or on the rebate form contained inside the package. In support of its motion, Corel submitted the declaration of Frank Giordano, TCA's president (Giordano declaration).[9] Giordano confirmed that

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9 Bivens suggests in his reply that the Giordano declaration was inadmissible because Giordano failed to date his declaration. We decline to address this argument because it was not made in Bivens's opening brief (see *Hibernia Savings & Loan Soc. v. Farnham* (1908) 153 Cal. 578, 584) and because it was raised only in a footnote in his reply (*Placer Ranch Partners v. County of Placer* (2001) 91 Cal.App.4th 1336, 1343

TCA processes rebate requests for Corel, and that in processing the requests, TCA verifies that the consumer has complied with the terms and conditions of the rebate offer as set forth on the rebate form enclosed in each Corel 3 and Corel 4 package. If the consumer has complied with the terms and conditions of the promotion, then the rebate request is processed and the consumer is issued a rebate check. The trial court admitted the Giordano declaration in evidence. The declaration constitutes sufficient evidence to support the trial court's determination that Corel imposes the conditions set forth on the rebate form and does not impose additional undisclosed conditions.

(ii) *Corel established that its rebate offers were not misleading*

Bivens suggests that by failing to list all of the material terms of the rebate offers on the front of the packages, and instead using only the statement "Get . . . cash back!" Corel has misled consumers into thinking that they would automatically receive a cash back rebate upon purchasing Corel 3 or Corel 4. We disagree.

"By their breadth, [sections 17200 and 17500] encompass not only those advertisements which have deceived or misled *because* they are untrue, but also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive

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fn. 9). Further, even if Bivens had properly raised such an argument, we are not convinced that the lack of a date would constitute a sufficient basis for invalidating the Giordano declaration. (See *People v. Flores* (1995) 37 Cal.App.4th 1566, 1575 [failure to properly date affidavit harmless in light of all circumstances].) Because the Giordano declaration was submitted contemporaneously with Corel's motion for summary judgment, and in view of the content of the declaration, we can deduce that the declaration was made near the time the motion was brought.

the consumer, such as by failure to disclose other relevant information, is actionable under these sections." (*Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 332-333.) Whether conduct or advertising is "misleading" under these statutory provisions is determined by applying a "reasonable consumer" standard. (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 509-510 (*Lavie*).)

The parties do not dispute the facts pertaining to Corel's advertising; the wording of the rebate offers and the terms and restrictions listed on the rebate forms is not in question. Therefore, whether Corel's rebate offer is likely to mislead reasonable consumers is a question of law. (See *Chern v. Bank of America* (1976) 15 Cal.3d 866, 872-873; see also *Lavie, supra*, 105 Cal.App.4th at p. 503.)

Printed immediately under the rebate offers of "cash back" were the words "See inside for details." Thus, potential purchasers were, at the very least, on notice that the rebate offers were not unconditional. It was clear to any potential purchaser that he or she would have to purchase the product and open it in order to learn the details of the rebate offer; the phrase "See inside for details" indicates that some conditions will apply to the rebate offer.[10]

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10 We note that this case does not involve the allegation that the material terms of a "cash back" rebate are inaccessible to consumers before they purchase an unreturnable item. The complaint alleged only that "all the material terms of the COREL 3 were not disclosed in the original offer, i.e., the advertisement on the product package or in the rebate coupon within the package. . . . Such material term was only disclosed after both eligible consumers received a denial of their rebate submissions." Bivens did not complain that the material terms were unavailable to a purchaser prior to buying a product package and that once the package was opened to find the material terms of the offer, the package could not be returned. If such an allegation had been raised in the

Bivens also claims that Corel's rebate offers constituted "bait advertising," a form of advertising he contends is explicitly prohibited by section 17500. Again, we disagree. Corel offered consumers a software package for sale for a certain price. Those consumers received what they paid for. Corel also offered eligible consumers the opportunity to receive some amount of the purchase price back in the form of a rebate. Those consumers who met the requirements of the rebate offer, as detailed on the rebate form contained inside the software package, received a rebate. Those consumers who did not meet the specified requirements did not receive a rebate. There is no evidence that Corel's rebate offer constituted a "bait and switch" scheme.

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complaint, on summary judgment Corel might have been required to make a prima facie showing that it did, in fact, disclose and make available all material terms of the rebate offer in a manner that would allow a consumer to read the terms and restrictions and allow that consumer to return the product if he or she did not wish to accept the terms of the offer. (Cf. *ProCD, Inc. v. Zeidenberg* (1996) 86 F.3d 1447, 1452-1453 [consumers can be bound to terms inside box of software if, after having the opportunity to read the terms and reject them by returning the product, they choose to go on and use the software].)

Bivens attempted to make this argument in the McMillan declaration by stating that retail stores would not accept opened software returns. However, the trial court sustained Corel's objections to the McMillan declaration and ruled it inadmissible. Additionally, the pleadings did not contain such allegations; therefore, this issue was not one Corel had to address in its summary judgment motion. (See *Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1400-1401.) ["First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond"].) Further, in his declaration, McMillan does not blame Corel for customers' inability to return opened software; rather, he alleges that *retailers* do not accept opened software returns.

Finally, Bivens contends that the trial court improperly required him to present survey evidence demonstrating that the rebate offers were likely to mislead the public. However, there is nothing in the trial court's minute order to suggest that the court imposed this requirement on Bivens. The court noted that even if it had considered the McMillan declaration, the declaration would have been insufficient to establish that the rebate offers were likely to mislead the public, citing *Freeman v. Time* (9th Cir. 1995) 68 F.3d 285 (*Freeman*), and *Lavie, supra*, 105 Cal.App.4th 496. Neither of these cases requires that the plaintiff present survey evidence. Rather, they stand for the proposition that the "reasonable consumer" standard applies to the question whether particular conduct is likely to mislead the public. (See *Freeman, supra,* 68 F.3d at p. 285; *Lavie, supra,* 105 Cal.App.4th at pp. 504-505.) The reasonable consumer standard is the proper standard to apply in determining whether Corel's rebate offers were "likely to mislead" the public. However, even if the trial court had required Bivens to present survey evidence showing that the rebate offers were likely to mislead the public, summary judgment would still have been appropriate because Bivens failed to provide *any* evidence demonstrating that Corel's rebate offers were likely to mislead the public.[11]

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11 The trial court cited to *Freeman, supra*, 68 F.3d 285, after concluding that the McMillan declaration was insufficient to establish that Corel's conduct was likely to mislead the public.

b. *Corel made a prima facie showing that the rebate offers did not violate section 17537.11*

Bivens maintains Corel failed to make a prima facie showing that it was entitled to summary judgment on his claims that Corel's rebate offers violate section 17537.11.

Section 17537.11 provides in relevant part:

> "(a) It is unlawful for any person to offer a coupon that is in any manner untrue or misleading.
>
> "(b) It is unlawful for any person to offer a coupon described as 'free' or as a 'gift,' 'prize,' or other similar term if (1) the recipient of the coupon is required to pay money or buy any goods or services to obtain or use the coupon, and (2) the person offering the coupon or anyone honoring the coupon made the majority of his or her sales in the preceding year in connection with one or more 'free,' 'gift,' 'prize,' or similarly described coupons.
>
> "(c) For purposes of this section:
>
> "(1) 'Coupon' includes any coupon, certificate, document, discount, or similar matter that purports to entitle the user of the coupon to obtain goods or services for free or for a special or reduced price."

Bivens alleges that Corel's rebate offers violate both subdivisions (a) and (b) of section 17537.11 because they are false and/or misleading and because they require that a consumer purchase the Corel product in order to receive cash back.

Subdivision (a)'s prohibition against "untrue or misleading" coupons corresponds with the UCL's prohibition against false or misleading advertising. We have already determined that the rebate offers were neither false nor misleading under the UCL. For the same reasons, Corel's rebate offers do not violate subdivision (a) of section 17537.11.

With regard to subdivision (b) of section 17537.11, we conclude that a rebate offer of the kind made by Corel for purchases of Corel 3 and Corel 4 does not constitute an

offer of "a coupon described as 'free' or as a 'gift, 'prize,' or other similar term." Corel's rebate offers were never described to consumers as "free" or as constituting a "gift" or "prize." Rather, it was clear that a consumer would be eligible to receive a rebate only after purchasing a Corel 3 or Corel 4 software package. There was no offer of a "free" rebate coupon. A rebate consists of "[a] return of part of a payment, serving as a discount or reduction." (Black's Law Dictionary (8th Ed. 2004) p. 1295, col. 1.) A rebate, by its very terms, is based on the existence of a previous purchase. Thus, a rebate could not be offered as "free." Rebate offers such as those involved in this case do not fall within the scope of section 17537.11, subdivision (b). (Cf. *Dept. of Alcoholic Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1194 ["rebate" is not the same as a "gift" or "free goods"].)

3. *Bivens failed to demonstrate the existence of any triable issue of material fact*

Because Corel made a prima facie showing that its rebate offers did not violate sections 17200, 17500, or 17537.11, the burden shifted to Bivens to demonstrate the existence of a triable issue of material fact. (See *Aguilar*, *supra,* 25 Cal.4th at p. 850.) He failed to meet this burden.

Bivens raised no issue of fact that remained unresolved after Corel established that consumers were provided with the material terms of the rebate offers, including the conditions that (1) the consumer must purchase the product within a certain time period; (2) the consumer must complete and send in the rebate form together with the original UPC code and an original or legible copy of the receipt by a date certain; (3) the

consumer was limited to one rebate per name or household; and (4) the consumer could not combine the rebate with any other promotions. Rather, the only facts Bivens submitted to the trial court were undisputed and served to further demonstrate the reasons Corel denied McMillan's rebate requests.

McMillan's receipt for his purchase of two packages of Corel 3 showed that both packages were bought by a single purchaser using the same MasterCard on a single occasion. This submission violated the restriction allowing only one rebate per name or household. Additionally, McMillan admitted he had purchased the Corel 3 packages on sale and with coupons, so that he ultimately paid less than $9.88 for each package of Corel 3. The rebate offer expressly prohibited combining the rebate offer with other promotions.[12]

Similarly, McMillan obtained a promotional rebate in the amount of $40 from Amazon.com for his purchase of Corel 4, through the Amazon.com Web site. He then submitted another rebate request to TCA, despite the fact that the rebate offer prohibited combining Corel's rebate offer with any other promotions. McMillan ultimately received $30 more from TCA, for a final purchase price of $19 for Corel 4.

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12 After paying just $9.88 per copy of Corel 3, McMillan would have received a windfall of $20.12 if he had received the rebate.

Bivens raised no triable issues of material fact. The evidence submitted demonstrated that Attorney McMillan did not meet the requirements of the rebate offer, and that his rebate requests were properly denied. Further, Bivens presented no evidence that Corel imposed undisclosed restrictions on its rebates.

4. *The trial court did not abuse its discretion in denying Bivens's request for a continuance to obtain further discovery*

Bivens contends that the judgment should be reversed because the trial court improperly denied his request to continue the hearing on the summary judgment motion in order to allow him time to obtain further discovery. We conclude that the trial court acted within its discretion in denying Bivens's request to continue the summary judgment hearing.

A party seeking to continue a hearing on a summary judgment motion " 'must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]' [Citation.]" (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633.) The decision whether to grant a continuance is reviewed for an abuse of discretion. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72.)

In its September 19, 2003 minute order, the trial court denied Bivens's renewed motion for a continuance, concluding that Bivens had "failed to establish that the requested discovery would defeat summary judgment and the reasons why [he] could not now present the information in [his] motion." However, before entering this order, the trial court gave Bivens further time for briefing and indicated it would allow him to

supplement his papers in the event he were to discover additional information after the deadline for filing his papers.

Bivens failed to establish that there was any reason to believe that facts essential to opposing the summary judgment motion existed. He also failed to give satisfactory reasons why he required additional time to obtain further discovery. Bivens had nearly six months between the initiation of this lawsuit and the date Corel filed its motion for summary judgment in which to serve discovery requests on Corel.[13] However, as of June 27, 2003, the date Corel moved for summary judgment, Bivens had conducted no discovery at all.

In view of the fact that Bivens failed to serve any discovery requests on Corel prior to the filing of the summary judgment motion, and because the court gave Bivens additional time to attempt to gather any further information that might create a triable issue of fact, we conclude that the court did not abuse its discretion in denying Bivens's request to continue the hearing on the summary judgment motion.

IV.

CONCLUSION

Bivens lacks standing to pursue this action, as a result of Prop. 64's amendment of section 17204. However, even if Bivens did have standing to pursue these claims, summary judgment for Corel is proper. Corel made a prima facie showing that its rebate

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13 Bivens filed his complaint on December 30, 2002. Corel filed its summary judgment motion on June 27, 2003.

offers associated with Corel 3 and Corel 4 were not false and that they were not likely to mislead consumers. In response to Corel's prima facie showing, Bivens failed to raise any triable issue of material fact. Consequently, Corel is entitled to summary judgment.

V.

DISPOSITION

The judgment of the trial court is affirmed. Corel is entitled to its costs on appeal.

CERTIFIED FOR PUBLICATION

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.