Supreme Court No. S132695

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

WEBSTER BIVENS,

Plaintiff/Appellant,

vs.

COREL CORPORATION,

Defendant/Respondent.

After a Decision By The Court of Appeal
Fourth Appellate District, Division One
Case No. D043407

ANSWER TO PETITION FOR REVIEW

Unfair Competition Case
(Bus. & Prof. Code §17209)

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To the Honorable Chief Justice of the Supreme Court Of California and the Honorable Associate Justices:

Corel Corporation ("Corel") respectfully submits the following Answer to the Petition for Review filed on behalf of Webster Bivens ("Bivens"):

I. INTRODUCTION

The trial court properly granted Corel's Motion for Summary Judgment, finding that Corel's rebate offers pertaining to its WordPerfect software products were neither untrue nor misleading to reasonable consumers. Preliminarily, after conducting an independent review of the record before the trial court, the Court of Appeal found that Corel had made a *prima facie* showing of its entitlement to summary judgment. In doing so, the Court of Appeal carefully and methodically reviewed the evidence, and noted that Corel's rebate offers of "cash back," immediately followed by the words "see inside for details," were not likely to mislead reasonable consumers, and further that by definition, rebate offers are not "coupons." The Court of Appeal then reviewed Bivens' evidence and found that he failed to meet the burden shifted to him to demonstrate the existence of a triable issue of material fact. Additionally, the Court of Appeal made note of the latitude the trial court granted Bivens in opposing the motion, and that Bivens did not show that facts existed that would defeat the motion or why he needed even more additional time to obtain any such facts, and correctly found that the trial court was within its discretion in denying Bivens' request for a continuance.

The Court of Appeal decision affirming the summary judgment motion on the merits is cogent and correct. The issues addressed present no important question of law or other grounds for this Court's review.

After the initial briefing, the Court of Appeal asked the parties to submit supplemental briefs addressing Proposition 64 and its applicability to pending cases, and its impact on this case. The Court of Appeal analyzed those issues, and correctly held that the Proposition 64 amendments eliminated the statutory right previously granted to a party who had sustained no injury to sue and prosecute claims under California's Unfair Competition Law ("UCL"). Because the amendments address a statutory right rather than a common law right, the court followed well established precedent and held that the amendments apply to all cases involving statutory rights pending on the effective date of the amendments, and consequently that Bivens no longer had standing to prosecute such claims as of that date. In its analysis, the Court of Appeal directly rejected the decision in *Californians for Disability Rights v. Mervyn's, LLC* (2005), 126 Cal.App. 4th 386 (*Mervyn's*). Of the six Court of Appeal decisions that have been issued addressing the applicability of Proposition 64 amendments to pending cases involving statutory rights, *Mervyn's* stands alone in holding that they do not. The Court of Appeal here forcefully demonstrated that *Mervyn's* erroneously relied on a case that had repealed a common law right rather than a statutory right. *Mervyn's* is so poorly reasoned that it is unlikely to be followed by any other Court of Appeal, and consequently there may be no need for this Court to grant any review. If this Court elects to address the inconsistency, it can best be done by reviewing and reversing *Mervyn's* or decertifying publication of that opinion. In

any event, because the decision in this case should be affirmed independently on the merits, the request for review of this case should be denied..

II. STATEMENT OF THE CASE[1]

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 included the following:

> Buy WordPerfect Family Pack 3 between July 1, 2001 and December 31, 2002
>
> 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 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

---

[1] Substantially summarized from Court of Appeal Opinion ("Opinion"), pp. 3-9.

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 substantially the same details as for Corel 3, except that the purchase dates were between July 1, 2002 and December 31, 2003; the form was to be received by January 30, 2004; and the limit of one rebate per name or household added the words "or corporation."

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' 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 its 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' 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' "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' 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' 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.

III. THIS CASE DOES NOT MERIT SUPREME COURT REVIEW UNDER RULE 28(b).

The trial court properly granted Corel's summary judgment motion, and the Court of Appeal correctly affirmed the summary judgment. In that regard, the Court of Appeal decision presents no unique or important question of law, nor does it conflict with any other Court of Appeal decisions. Review should be denied for that reason alone, since none of the grounds for review set forth in California Rule of Court ("CRC") 28(b) exist.

Additionally, the Court of Appeal requested the parties to brief the applicability of Proposition 64 amendments to cases filed before the effective date of Proposition 64, and the impact of those amendments on this case. Although unnecessary to its decision affirming the summary judgment on the merits, the Court of Appeal conducted an analysis of the Proposition 64 issues, and relying on established precedent held that because the amendments repealed a statutory right rather than a common law right, they apply to all pending cases as of the effective date, and require that a plaintiff suffer injury in fact in order to have standing to prosecute a UCL claim. Bivens admitted he suffered no injury; therefore he has no standing, and the Court of Appeal affirmed the judgment on that additional ground. (Opinion, pp. 14-16, 29, 30.) This aspect of the decision likewise presents no novel or important question of law that needs to be addressed by this court, although it does conflict with the erroneous *Mervyn's* decision. *Mervyn's* stands alone and has been criticized and not followed in any of the five subsequent

Proposition 64 cases. It is therefore not necessary to grant review here because it is unlikely that any subsequent court will follow that decision. In any event, if this court elects to review the Proposition 64 issues, it would be more logical and efficient to do so by reviewing or decertifying publication of the *Mervyn's* decision.

A. Corel Was Entitled to Summary Judgment on the Merits

Corel's motion for summary judgment was properly granted and affirmed because Corel made a *prima facie* showing of no triable issues of material fact, and Bivens failed to meet his burden of showing the existence of any triable issue of material fact.

1. Summary Judgment Standards and Independent Appellate Review

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 (*Aguilar*).)

As noted by the Court of Appeal, the parties agreed that on review of the trial court's order, the appellate court must apply the same analysis that the trial court applied in determining the merits of Corel's summary judgment motion. (Opinion, p. 17.) "'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.) "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

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

Bivens alleged that the rebate offers printed on the front of the Corel 3 and Corel 4 packages that stated "Get . . . cash back" were false and misleading, thus violating sections 17200 and 17500. Specifically, Bivens argued 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. Section 17200 prohibits any unlawful, unfair, or fraudulent business acts or practices, including deceptive or misleading advertising prohibited pursuant to section 17500.

Thus, in order to prevail on its Motion for Summary Judgment, Corel had to make a *prima facie* showing that its rebate offers were neither untrue nor misleading. As the

trial court found, and as the Court of Appeal also found after conducting its independent review of the record, Corel met its burden, stating "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." (Opinion, p. 19.)

Corel made a *prima facie* showing that its rebate offers were not false. 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' argument that these offers were untrue and/or misleading fails to acknowledge that Corel's offer was not a blanket offer to anyone who purchased Corel 3 or Corel 4 could get cash back. To the contrary, Corel's rebate offers contained certain restrictions that were detailed, as the product package indicated, on a form inside the package.

Bivens also alleged that Corel imposed additional undisclosed restrictions on the consumers that allowed it to avoid satisfying the rebate claims from otherwise eligible consumers, namely that Corel failed to inform consumers that multiple purchases evidenced on the same receipt would not be eligible for the rebate.

In response to these allegations, Corel was required to make a *prima facie* showing 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 and the trial court admitted the declaration of Frank Giordano, TCA's president ("Giordano Declaration"). Giordano confirmed that 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 Court of Appeal correctly observed that the Giordano Declaration constituted 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. (Opinion, pp. 20-21.)

Corel also established that its rebate offers were not misleading. 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 offers are 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. Accordingly, the Court of Appeal correctly rejected Bivens' argument that Corel misled consumers into thinking they would unconditionally and automatically receive a cash back rebate upon purchasing Corel 3 or Corel 4. (Opinion, pp. 21-22.)[2]

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[2] The Court of Appeal also noted 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 because 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." (Opinion, pp. 22-23, fn 10.) 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 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

The Court of Appeal also correctly rejected Bivens' argument that Corel's rebate offers constituted "bait advertising," a form of advertising he contends is explicitly prohibited by section 17500. (Opinion, p. 23.) In doing so, it observed that Corel offered consumers a software package for sale for a certain price, and those consumers received what they paid for; that Corel also offered eligible consumers the opportunity to receive some amount of the purchase price back in the form of a rebate; that those consumers who met the requirements of the rebate offer, as detailed on the rebate form contained inside the software package, received a rebate; and those who did not meet the specified requirements did not receive a rebate. Thus, the Court of Appeal specifically found that there is no evidence that Corel's rebate offer constituted a "bait and switch" scheme. (Opinion, p. 23.)[3]

The Court of Appeal likewise found that Corel made a *prima facie* showing that the rebate offers did not violate section 17537.11, rejecting Bivens' argument that Corel's

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declaration, McMillan does not blame Corel for customers' inability to return opened software; rather, he alleges that retailers do not accept opened software returns.

[3] The Court of Appeal also rejected Bivens' argument that the trial court improperly required him to present survey evidence demonstrating that the rebate offers were likely to mislead the public, observing that nothing in the trial court's minute order suggested that the court impose this requirement on Bivens and further that the trial court stated 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. The Court of Appeal additionally stated that neither of these cases requires that the plaintiff present survey evidence. Finally, the Court of Appeal stated that 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.

rebate offers violate both subdivisions (a) and (b) of section 17537.11.[4] (Opinion, pp. 25-26.)

The Court of Appeal noted that subdivision (a)'s prohibition against "untrue or misleading" coupons corresponds with the UCL's prohibition against false or misleading advertising, and that it had already determined that the rebate offers were neither false nor misleading under the UCL, and for the same reasons, Corel's rebate offers do not violate subdivision (a) of section 17537.11. (Opinion, p. 25.)

With regard to subdivision (b) of section 17537.11, the Court of Appeal concluded that by definition 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," because Corel's rebate offers were never described to consumers as "free" or as constituting a "gift" or "prize," and here it was clear that a consumer would be eligible to receive a rebate only after purchasing a Corel 3 or Corel 4 software package (citing Black's Law Dictionary (8th Ed. 2004) p. 1295, col. 1. and *Dept. of*

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[4] 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."

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.)

The Court of Appeal properly determined that Bivens failed to meet his burden, in that he raised no remaining issue of material fact after Corel had 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. (Opinion, pp. 26-28.)

The only facts Bivens submitted to the trial court were undisputed and served to further demonstrate that Corel properly denied McMillan's rebate requests. As summarized by the Court of Appeal:

> "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.[5]
>
> "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."

(Opinion at p. 27.)

Therefore, the Court of Appeal continued:

> "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."

(Opinion, p. 28.)

4. The Trial Court Did Not Abuse its Discretion in Denying Bivens' Further Request for Additional Time to Obtain Discovery

As the Court of Appeal correctly pronounced, 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.) (Opinion, p. 28.)

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[5] 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.

The Court of Appeal agreed with the trial court in determining that Bivens failed to make any such showing, and concluded that the trial court, which granted Bivens a prior extension and additional time to supplement his brief, acted within its discretion in denying Bivens' motion to continue the summary judgment hearing. (Opinion, pp. 28-29.)

In the trial court's September 19, 2003 minute order, Bivens' renewed motion for a continuance was denied, 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." (Opinion, pp. 28-29.) 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. (Id.)

As the Court of Appeal stated:

> "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 [December 30, 2003] and the date Corel filed its motion for summary judgment in which to serve discovery requests on Corel. However, as of June 27, 2003, the date Corel moved for summary judgment, Bivens had conducted no discovery at all."

(Opinion, p. 29.)

Thus, the Court of Appeal concluded that the trial court did not abuse its discretion in denying Bivens' request to continue the hearing on the summary judgment motion. (Opinion, p. 29.)

5. The Summary Judgment Presents No Grounds for Review.

The Court of Appeal, based on its thorough and independent review of the record, and applying well settled precedent, affirmed the summary judgment for Corel on the merits. Corel made a *prima facie* showing that its rebate 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. As demonstrated, this decision presents no important question of law or other ground for this court to grant review.

B. Bivens, Who Admits No Injury, Now Lacks Statutory Standing to Prosecute UCL Claims

Proposition 64 amends certain provisions of the UCL, set forth at section 17200 et seq. As relevant here, Proposition 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 Proposition 64's passage, section 17204 provided 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 acting for the interests of itself, its members or the general public*." (Emphasis 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.) (Emphasis added.)

The statute, as amended, prevents unaffected plaintiffs from being able to file actions on behalf of the general public. (Proposition 64, sections 2, 3, 5.) Under current law, only persons who have "suffered injury in fact" as a result of the business practices complained of have standing to bring an action for relief under the UCL.

After the voters approved Proposition 64 and after the parties had filed their briefs, the Court of Appeal requested the parties to file supplemental briefs addressing 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? (Opinion, p. 10.)

Bivens filed this action against Corel on December 30, 2002, almost two years before Proposition 64 was enacted. (Opinion, p. 6.) 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 (*San Bernardino*).) The Court of Appeal therefore

decided to consider whether the newly amended version of the UCL applies to this case, which was filed prior to Proposition 64's approval by the voters but was still pending at the time Proposition 64 became effective. (Opinion, p. 11.)

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 (*Southern Service*); 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) (*Metabolife Int'l, Inc.*).[6]

"'The justification for this rule is that all statutory remedies are pursued with full realization that the [Legislature 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

[6] In Bivens' brief, he erroneously characterizes this issue as whether the Proposition 64 amendments should be applied "retroactively." The proper analysis as set forth in the authorities and in the Court of Appeal decision herein, does not implicate retroactivity, but rather the doctrine that amendment affecting a right created by statute takes immediate effect on all pending claims. (See Opinion, pp. 15-16.)

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" (*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 (*South Coast*).) 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*).)

The Court of Appeal correctly noted that Bivens' right to state a claim against Corel was not based on common law rights, but, rather, depended wholly upon provisions of the UCL. (Opinion, p. 12.) Proposition 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. (Opinion, p. 12.) Although Proposition 64 did not act to entirely repeal any of the UCL's causes of action,[7] its repeal of unaffected

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[7] 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, 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 Proposition 64. Although Proposition 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

plaintiff standing is sufficient to completely extinguish Bivens' right to bring his claims. (Opinion, pp. 12-13.) The Court of Appeal reached this conclusion because insofar as Proposition 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. (Id.) Further, the Court of Appeal observed that Proposition 64 contains no savings clause to exclude from its reach cases filed prior to its effective date, and without a savings clause, Proposition 64's repeal of unaffected plaintiffs' statutory authorization to pursue UCL claims is effective immediately. (Id.)

The Court of Appeal then directly addressed the *Mervyn's* case, *supra*, noting that case held that Proposition 64 does not apply to cases filed prior to the effective date of the new law. (Opinion, p. 13.) The Court of Appeal observed that in rejecting the argument that the statutory repeal doctrine rendered Proposition 64 applicable to pending cases, the *Mervyn's* court relied on the California Supreme Court's decision in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 (*Evangelatos*). (Opinion, p. 13.)

The Court of Appeal then boldly and correctly stated:

> In our view, *Evangelatos* is inapposite to the question whether to apply Proposition 64 to pending cases because the Proposition at issue in that case did not repeal a *statutory* right, as Proposition 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.

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unactionable; it left intact the provisions creating causes of action against defendants for allegedly unlawful, unfair, or fraudulent business practices.

> (*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 [*Mervyns*].

(Opinion, pp. 13-14; emphasis in original.)

As the Court of Appeal correctly observed, there is now no statutory authorization granting Bivens standing to prosecute the UCL claims raised in this case. (Opinion, p. 14.) 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' 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.[8] (See *Cloud v. Northrop Grumman Corp.* (1998) 67

[8] 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, the complaint cannot be amended to substitute in a real party in interest because, as

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].) (Opinion, pp. 14-15.) Thus, even if Bivens' action was meritorious, which the Court of Appeal concluded it is not, Bivens could not pursue it because he lacks standing. (Id.)

Because Proposition 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. (Opinion, p. 15.) Bivens' statutory right to pursue this case had not yet vested at the time Proposition 64 repealed that right, and because Bivens' 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.) (Opinion, p. 15.) Thus, the court was required to apply the law as it stands today to the case. (*Beckman v. Thompson* (1991) 4 Cal.App.4th 481, 489 (*Beckman*) ["[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]".) (Opinion, p. 15.)

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discussed above, the Court of Appeal concluded that Corel was entitled to summary judgment on the claims raised in the complaint. Because the claims raised in the complaint fail as a matter of law, there remain no claims for a new plaintiff to pursue. (Opinion, pp. 14_15, fn. 5.)

The complaint cannot be amended to substitute in a real party in interest because, as discussed above, the Court of Appeal concluded that Corel was entitled to summary judgment on the claims raised in the complaint. Because the claims raised in the complaint fail as a matter of law, there remain no claims for a new plaintiff to pursue. (Opinion, pp. 14-15, fn. 5.)

As dictated by well established controlling precedent, including *Evangelatos, supra, Southern Service Co., Ltd., supra, Mann, supra, Krause, supra, Metabolife Int'l, Inc., supra, San Bernardino, supra, South Coast, supra, One 1953 Buick 2-Door, supra*, and *Beckman, supra*, because the statute, as it stands today does not allow an uninjured individual to pursue the statutory UCL claims against a defendant on behalf of the general public, as of today Bivens lacks standing to pursue the claims he asserted in this lawsuit. (Opinion, p. 16.) The Court of Appeal followed these precedents, and so held in this case. The four other Court of Appeal decisions addressing these issues have reached the same result. (See *Frey v. TransUnion* Corp. (2005), ___ Cal.App.4th ____, 2005 WL 675498; *Lytwyn v. Fry's Electronics Inc.* (2005), 126 Cal.App.4th 1455; *Branick v. Downey Savings & Loan Assn.* (2005), 126 Cal.App.4th 828; *Benson v. Kwikset Corp.* (2005), 126 Cal.App.4th 887.) (Opinion, pp. 15-16.) The *Mervyn's* case is an anomaly and it is unlikely to be followed. *Mervyn's* is best addressed, if at all, by reviewing and reversing that decision, or decertifying its publication. As shown, there is no reason under these circumstances for this Court to grant review of the instant case.

IV. CONCLUSION

As demonstrated, Corel was entitled to summary judgment on the merit and that aspect of the decision presents no important question of law or other ground for this Court to grant review.

As to the additional basis that the Court of Appeal held the case should be dismissed, that is the passage of Proposition 64 while the case was pending which eliminated Bivens' statutory right to have standing to prosecute UCL claims, the court followed longstanding and controlling precedent, and that aspect of the decision likewise presents no important issue of law for review. Four other Court of Appeals decisions, all issued within the last three months, reached the same result as reached in this case. The *Mervyn's* decision is an anomaly and is unlikely to be followed. In any event, if the Court views it appropriate to eliminate the *Mervyn's* inconsistency, it should review or republish that opinion, rather than granting review of this decision.

Dated: April 18, 2005

Respectfully submitted

DLA PIPER RUDNICK GRAY CARY US LLP

By:

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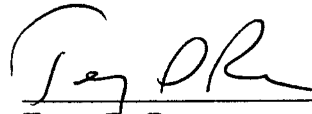
CERTIFICATE OF WORD COUNT

I, Terry D. Ross, certify that the foregoing Answer to Petition for Review contains 7350 words (including footnotes, but excluding the certificate of service, and this certificate of word count), as reported by Microsoft Word 2000, the word processing software used to prepare this brief.



Terry D. Ross

Bivens v. Corel Corporation

Supreme Court No. S132695
Appellate No. D043407
Superior Court No. GIC802976

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; I am employed in the County of San Diego, California, within which county the subject mailing occurred; my business address is: 4365 Executive Drive, Suite 1100, San Diego, CA 92121-2133; and that on April 18, 2005, I served the below-named person(s) with a true copy of the following documents: **ANSWER TO PETITION FOR REVIEW** in the following manner:

1) ☒ **[MAIL]** by placing in a sealed, postage prepaid envelope or package containing a true and copy of each document(s) above, in DLA Piper Rudnick Gray Cary US LLP's mail room for collection, processing and delivery this same day to the United States Postal Service. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business,

2) ☐ **[PERSONAL DELIVERY]** By personally delivering copies to the person served.

3) ☐ By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left.

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Attorney General of the State of California ATTN: Consumer Law Section 600 South Spring Street Los Angeles, CA 90013	X Served 1 copy
San Diego County District Attorney 330 West Broadway San Diego, CA 92101	X Served 1 copy

I certify under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed on April 18, 2005, at San Diego, California.

ANJALI B. STRAUSS

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