Filed 11/22/05; pub. order 12/7/05 (see end of opn.; appen. not included with computer version)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| WEBSTER BIVENS,<br>Plaintiff and Appellant,<br>v.<br>GALLERY CORPORATION,<br>Defendant and Respondent. | D045557<br><br>(Super. Ct. No. GIC832910) |

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes, Judge. Affirmed.

Plaintiff Webster Bivens appeals the judgment of dismissal entered against him after a demurrer to his complaint for declaratory and equitable relief based on causes of action for false advertising and unfair business practices under Business and Professions Code[1] sections 17200, 17500, and 17504, brought by defendant Gallery Corporation, dba Mattress Gallery, a Delaware corporation (Gallery or defendant), was sustained without

1 All statutory references are to the Business and Professions Code unless otherwise specified.

leave to amend.[2] In addition to contending the trial court erred in sustaining Gallery's demurrer on the three causes of action he alleged under provisions of California's Unfair Competition Law (§ 17200 et seq., UCL) and the False Advertising Act (§ 17500 et seq.), Bivens asserts Proposition 64 (Prop. 64), which was passed by the voters of California on November 2, 2004, shortly before the court ruled on the demurrer and which narrowed the class of persons who can maintain actions under the UCL and the False Advertising Act, should not be applied retroactively to preclude him from bringing his causes of action. Recognizing this court has previously held Prop. 64 applies to UCL and false advertising actions filed before its effective date of November 3, 2004, which are not yet final on appeal and the issue of Prop. 64's retroactivity is pending before our Supreme Court in those cases[3] as well as in other court of appeal cases,[4] Bivens requests we grant

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2 Although the notice of appeal refers to the final judgment of dismissal, it was filed before the judgment was rendered. We deem the premature notice to have been timely filed. (Cal. Rules of Court, rule 2(e).)

3 The court has granted review in the following cases from this court: *Bivens v. Corel Corp.* (2005) 126 Cal.App.4th 1392, review granted April 27, 2005, S132695; *Lytwyn v. Fry's Electronics, Inc.* (2005) 126 Cal.App.4th 1455, review granted April 27, 2005, S133075; and *Thornton v. Career Training Center, Inc.* (2005) 128 Cal.App.4th 116, review granted July 20, 2005, S133938.

4 The Supreme Court has also granted review in *Branick v. Downey Savings & Loan Assn.* (2005) 126 Cal.App.4th 828, review granted April 27, 2005, S132433; *Californians for Disability Rights v. Mervyn's* (2005) 126 Cal.App.4th 386, review granted April 27, 2005, S131798; *Benson v. Kwikset Corp.* (2005) 126 Cal.App.4th 887, review granted April 27, 2005, S132443; *Schulz v. Neovi Data Corp*. (2005) 129 Cal.App.4th 1, review granted August 10, 2005, S134073; *Cohen v. Health Net of California, Inc.* (2005) 129 Cal.App.4th 841, review granted August 31, 2005, S135104; and *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2005) 129 Cal.App.4th 540, review granted September 28, 2005, S135587.

him leave to amend his complaint to meet the new standing requirements if we maintain our view that Prop. 64 applies to such existing causes of action.

We conclude, consistent with our previous positions, that Prop. 64 applies to this action and, as a result, Bivens lacks standing under sections 17204 and 17535, which were amended by Prop. 64, to pursue this action as pled. We deny Bivens's request to amend his complaint to try to satisfy the requirements of Prop. 64 because the trial court correctly determined as a matter of law no cause of action under sections 17200, 17500, or 17504 had been or could be pled.[5] We, therefore, find the court properly sustained Gallery's demurrer to Bivens's complaint without leave to amend and affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL HISTORY

According to the pleadings, Bivens is a senior citizen residing in San Diego entitled to calendar preference (§ 17206.1, subd. (b)(1); Civ. Code, § 1761, subd. (f); Code Civ. Proc., § 36) who is "unaffected by [Gallery's] conduct" and bringing this action under the UCL "on behalf of the general public pursuant to . . . §§ 17204 and

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5 We also deny Bivens request we take judicial notice of certain documents and facts contained in the National Institute for Literacy internet cite "www.nifl.gov," which notes, among other things, that based on a literacy survey in the 1990s, 24 percent of Californians are at a "level one literacy," which usually includes the inability to calculate the total cost of a purchase from an order form. As Gallery points out in its opposition to Bivens's request, the information requested provides extrinsic evidence properly not considered by the court below on demurrer (see *Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881) in addition to being reasonably subject to dispute and irrelevant to the reasonable consumer standard for determining the issue of whether advertising is unfair and misleading under the UCL and False Advertising Act in 2003 and 2004. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1062.)

17535." Bivens alleges that on or about December 7, 2003, February 15 and 21, 2004, and June 27, 2004, Gallery "published an advertising supplement in the Los Angeles Times depicting an image of a woman on a mattress and an advertisement for mattresses to the right of the image. The advertisement states 'PRICING STARTING AS LOW AS . . . $48' in large type. In smaller print it states 'TWIN EA. PC.' In substantially smaller type, in parenthesis, it states 'SOLD IN SETS ONLY.' " Bivens alleges the failure to give the total price for twin sets, when read in conjunction with the unit price, is likely to mislead consumers. In addition, he alleges the failure to define what constitutes a "set" is likely to mislead consumers. Copies of the advertisements are attached to the complaint as Exhibits A, B, C, and D.[6] Bivens alleged Gallery "refused to sell to their retail customers any single twin mattress or box spring referred to herein for the advertised unit price."

In his first cause of action, Bivens alleged a violation of section 17504, incorporating the above allegations and further claiming "[o]n one or more occasions, defendants advertised the unit price for merchandise that defendants sold, at that unit price, only in multiple units, without stating the price that the consumer must pay for the minimum quantity of merchandise sold as a multiple unit offer."

In his second cause of action, Bivens alleged a violation of section 17500, incorporating all earlier allegations and further claiming "[o]n one or more occasions defendants advertised merchandise, including mattresses, in a manner that would lead an

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6 Copies of exhibits A through D are attached hereto as an appendix.

average reasonable consumer to believe that one could purchase a unit of merchandise at the unit price stated in the advertisements. It was untrue, and therefore misleading, e.g., that defendants would sell a single twin size mattress or box spring at the advertised one-piece price." Bivens additionally alleged that "[a]s part of a plan or scheme, on one or more occasions defendants advertised merchandise, specifically mattresses, in a manner that would lead an average reasonable consumer to believe that he could purchase a unit of the items offered in the advertisements, with the intent not to sell such merchandise at the prices stated therein."

In his third cause of action, Bivens alleged a violation of section 17200, incorporating all the above allegations and further claimed "[D]efendants have engaged in unfair competition . . . in that they have engaged in (1) acts or practices that are unlawful; (2) acts or practices that are unfair; (3) acts or practices that violate Chapter 1 (commencing with § 17500) of Part 3, of Division 7, of the Business and Professions Code; and (4) have utilized unfair, deceptive, untrue or misleading advertising. This conduct is actionable, and thereby unlawful pursuant to . . . § 17203."

Bivens then specifically alleged that the unlawful acts and practices by Gallery were:

> "A. Defendants violated . . . section 17504, as explained fully above in the First Cause of Action; [¶] B. [I]n order to obtain the mattresses at the advertised unit price, a consumer must purchase a set of mattresses, which contains two pieces. The advertising of the single mattress is false or otherwise untrue, in that defendants will not sell a single twin mattress at the advertised per-piece price, thereby constituting unfair, deceptive, untrue or misleading advertising that is likely to mislead a reasonable member of the consuming public; [¶] C. Defendants utilized the advertising

> techniques throughout California, exemplified by Exhibits A through D, which are likely to mislead and confuse the consuming public as to the price of the advertised product payable at the store; and [¶] D. Defendants published the advertisement stating the sale price for mattresses at a single unit price, while intending to not sell the advertised merchandise as advertised, to wit: individually at the per-piece price for twin size mattresses, in violation of the Consumer Legal Remedies Act, Civil Code § 1750, et seq., at § 1770(a)(9) and Business and Professions Code § 17500."

Bivens prayed for a declaratory judgment that Gallery was using unlawful advertising techniques and that such unlawful advertising provided Gallery with an unfair competitive advantage over its law-abiding competitors. Bivens also asked for the appointment of a receiver to conduct an accounting of amounts Gallery had received due to its unlawful advertising and to supervise restitution to any identifiable customers who had paid more than "the advertised prices for one-mattress purchases of the advertised mattresses," for preliminary and permanent injunctive relief, for attorney fees under the "substantial benefit doctrine," as well as costs and investigative expenses.

Gallery demurred to Bivens's complaint on grounds there was no violation of section 17504 as alleged in the first cause of action and with regard to the second and third causes of action there was no violation of any other statute and nothing false and misleading about the advertisements which would confuse a reasonable consumer who would know exactly what he or she was able to buy and for what price. Gallery asserted the complaint should be dismissed in its entirety without leave to amend because Bivens could not amend it to allege facts to support the UCL or false advertising causes of action based on the advertisements which were proper as a matter of law. Gallery also filed a

request the court take judicial notice of the legislative history of section 17504. Bivens opposed the motion and request for judicial notice.

On November 5, 2004, the trial court issued a tentative ruling, stating:

> "Defendant Gallery['s] Demurrer is sustained without leave to amend as to all three (3) causes of action alleged in the complaint based on violations of . . . [sections] 17504, 17500, & 17200. As a matter of law, the subject advertisement gives adequate notice of the price of the sets available for purchase. A 'set' as advertised for sale does not constitute 'multiple units' within the meaning of [section] 17504. The subject advertisement does not contain any false or misleading statements in violation of [section] 17500. The subject advertisement does not contain any unfair, deceptive, untrue, or misleading advertising in violation of [section] 17200 because the advertisement states the minimum price per piece and notifies reasonable consumers that the sale price only applies to 'sets.' "

After hearing oral argument, the court took the matter under submission. On November 9, 2004, the court confirmed its earlier tentative as the final ruling on Gallery's demurrer. On February 23, 2005, the court issued a final order and judgment of dismissal in favor of Gallery.

## DISCUSSION

### I

### STANDARD OF REVIEW

Because a demurrer tests the sufficiency of a complaint by raising questions of law (*Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 20), for purposes of analyzing the ruling on a demurrer, we take as true the allegations in the complaint, but not conclusions of fact or law. (*Moore v. Conliffe* (1994) 7 Cal.4th 634, 638; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) In addition to the facts actually pleaded, we may consider facts of which we

may take judicial notice. (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 877.)

Generally, "[o]n appeal from a judgment of dismissal entered after a demurrer has been sustained without leave to amend, unless failure to grant leave to amend was an abuse of discretion, [we] must affirm the judgment if it is correct on any theory. [Citations.] If there is a reasonable possibility that the defect in a complaint can be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend. [Citation.] The burden is on the plaintiff, however, to demonstrate the manner in which the complaint might be amended. [Citation.]" (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

When reviewing a ruling on a demurrer, we independently determine whether a cause of action is stated under a consideration of all of the facts pled, considered as true, such that the plaintiffs should be entitled to any relief. In doing so, "[w]e do not review the validity of the trial court's reasoning but only the propriety of the ruling itself. [Citations.]" (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.) Our consideration of facts includes those evidentiary facts found in recitals of exhibits attached to a complaint (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94), and those facts pled in the attached documents control over any inconsistent allegations made in the pleadings. (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.)

II

PROP. 64 NEGATES BIVENS'S STANDING TO PURSUE HIS UCL AND FALSE ADVERTISING CLAIMS

Prop. 64, which was approved by the voters in the November 2004 General Election, amended certain sections of the UCL, sections 17200 et seq., and the False Advertising Act, sections 17500 et seq. As relevant here, Prop. 64 specifically amended sections 17204 and 17353 to inject a standing requirement for actions under these related laws. As so amended, section 17204 now reads in relevant 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.) Amended section 17535 now reads in pertinent part: "Actions for injunction under this section may be prosecuted 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 a violation of this chapter. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section and complies with Section 382 of the Code of Civil Procedure.*" (§ 17535; italics added.)[7] These statutes, as amended, prevent unaffected plaintiffs from being able to file actions on behalf of the

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[7] Section 17203 was also amended to read in pertinent part that "[a]ny person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure."

general public. Under current law, only persons who have been injured in fact and have lost money or property as a result of the alleged unfair competition or false advertising have standing to bring actions for relief under the UCL and the False Advertising Act.

Although Prop. 64 was effective at the time of the court's December 2004 ruling on Gallery's demurrer (Cal. Const., art. II, § 10, subd. (a)), neither the court nor the parties mentioned such amendment with regard to Gallery's motion. As Bivens notes in his opening brief, the issue of whether Prop. 64 applies to cases not yet final is pending in numerous cases before our Supreme Court. (See *ante*, fns. 2 and 3.) Relying on *McClung v. Employment Development Department* (2004) 34 Cal.4th 467 (*McClung*) and arguments of statutory interpretation, vested property rights, substantive effect and federal law, Bivens contends Prop. 64 does not apply to existing causes of action such as his filed before its passage. He impliedly concedes, however, that if we agree with the position this court has taken on the issue, finding that Prop. 64 applies to pending cases filed before Prop. 64 became effective, he would not have standing to bring his causes of action as pled. If such is our determination, he requests we grant him leave to amend to meet the new standing requirements.

Consistent with the already mentioned cases on review from this court, we also determined in *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc*. (2005) 129 Cal.App.4th 1228 (*Huntingdon*) that Prop. 64 applies to cases filed before its effective date. (*Id*. at p. 1262.) We have reconsidered our reasoning for so holding in *Huntingdon* in light of Bivens's arguments and continue to adhere to such rationale. Although *Huntingdon* concerned a cause of action for unfair competition

alleged only under section 17200 et seq., the same reasoning regarding Prop. 64's applicability to pending cases applies as well to causes of action for false advertising brought under section 17500 et seq. because it, like section 17200 et seq., provides a purely statutory remedy which was repealed by Prop. 64 without a savings clause. (See *Huntingdon, supra*, 129 Cal.App.4th at pp. 1260-1262.)

Contrary to Bivens's reliance on *McClung*, "[t]he repeal of a statutory right or remedy . . . presents entirely distinct issues from that of the prospective or retroactive application of a statute. A well-established line of authority holds: ' " 'The unconditional repeal of a special remedial statute without a savings clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered.' " [Citations.]' [Citations.]" (*Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 125-126, italics omitted; see also *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109; *Callet v. Alioto* (1930) 210 Cal. 65, 67 (*Callet*).)

"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." (*Callet, supra*, 210 Cal. at pp. 67-68; see also Gov. 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."].) " 'Because it is a creature of statute, the right of action exists only so far and in favor of such person as the legislative

[or initiative] power may declare.' [Citation.] Unlike a common law right, a ' "statutory remedy does not vest *until final judgment*." ' [Citation.]" (*Huntingdon*, *supra*, 129 Cal.App.4th at pp. 1261-1262.)

Because the complaint in *Huntingdon* showed that one of the individual plaintiffs had sustained damage to real and personal property, we found she had standing under amended section 17204 to proceed individually with her unfair competition cause of action. (*Huntingdon, supra*, 129 Cal.App.4th at p. 1262.) To the extent the complaint also alleged she was representing the general public, we found she could not do so without complying with the class action certification procedures of Code of Civil Procedure 382 as required by amended sections 17203 and 17204. (*Ibid*.)

Here, unlike the individual plaintiff in *Huntingdon*, Bivens has not alleged any "injury in fact" and loss of money or property as a result of unfair competition and/or false or misleading advertising, which is required now to show standing to prosecute the UCL claims in his complaint. (§§ 17204, 17535.) Nor has he made any allegations necessary under Code of Civil Procedure section 382 to represent a class of plaintiffs, which he would be unable to do in light of his admission in the complaint that he is an unaffected plaintiff. (See §§ 17203, 17535.) Amending his complaint to plead otherwise would directly conflict with this admission and would not be allowed to avoid the defect in standing. (See *Freeman v. San Diego Ass'n of Realtors* (1999) 77 Cal.App.4th 171, 178, fn. 3.) Thus as applied to this case which is not final, Prop. 64 deprives Bivens of standing to pursue his causes of action as pled in his complaint.

Unless the complaint could be amended by substituting a party who has standing to sue for Bivens on the same set of facts and advertisements, Bivens's lack of standing due to Prop. 64 applying to this case creates a nonwaivable, jurisdictional defect which is itself grounds for dismissal of Bivens's action. (See *Cloud v. Northrop Grumman Corp*. (1998) 67 Cal.App.4th 995, 1005-1006; see also *Klopstock v. Superior Court of San Francisco* (1941) 17 Cal.2d 13, 20.) Bivens has not suggested any way in which the complaint could be amended to state a claim based on its alleged facts and the attached advertisements. Only if those facts and advertisements provided viable claims would we find the trial court had abused its discretion to permit Bivens to attempt to amend the complaint to substitute in a real party in interest who has injury in fact to satisfy the new standing requirements. However, as we explain below, the trial court properly found Bivens could not state causes of action under sections 17200, 17500 or 17504 based upon the attached advertisements. Consequently, the claims Bivens raised in the complaint fail as a matter of law and there remain no claims for a new plaintiff to pursue. It would therefore be futile and improper to grant Bivens leave to amend the complaint.

## III

## THE ADVERTISEMENTS AT ISSUE DO NOT SUPPORT UCL OR FALSE ADVERTISING CAUSES OF ACTION

Even if Bivens had standing to pursue this action, we conclude he has not, and cannot, as a matter of law state a cause of action under sections 17504, 17500 or 17200 based on the advertisements attached as exhibits to the complaint. We address each cause of action in turn.

*A. The First Cause of Action Under Section 17504*

Bivens specifically argues the trial court erred in sustaining the demurrer to the first cause of action by reading section 17504 too narrowly to limit it to single goods sold only in multiple units. We disagree.

Section 17504 provides in relevant part:

> "(a) Any . . . corporation . . . engaged in business in this state as a retail seller who sells any consumer good or service which is sold only in multiple units and which is advertised by price shall advertise those goods or services at the price of the minimum multiple unit in which they are offered. [¶] (b) Nothing contained in subdivision (a) shall prohibit a retail seller from advertising any consumer good or service for sale at a single unit price where the goods or services are sold only in multiple units and not in single units as long as the advertisement also discloses, at least as prominently, the price of the minimum multiple unit in which they are offered. [¶] (c) For purposes of subdivisions (a) and (b), 'consumer good' means any article which is used or bought for use primarily for personal, family, or household purposes, but does not include any food item. [¶] . . . [¶] (e) For purposes of subdivisions (a) and (b), 'retail seller' means [a corporation] which engages in the business of selling consumer goods or services to retail buyers."

Generally, "[t]he court's role in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law and, in doing so, the court looks first to the words of the statute. [Citation.]" (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129.) If the language of the subject statute is clear and unambiguous, "judicial construction is not necessary and a court should not indulge in it. [Citation.]" (*Ibid.*) However, "[i]f the language is ambiguous, we may look to the history and background of the statute to ascertain legislative intent. [Citation.]" (*Ibid.*) Such extrinsic evidence of the Legislature's intent, includes the ostensible "public policy,

contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.)

Here we need not indulge in such judicial construction of section 17504 as we conclude its language is clear and unambiguous that the phrase "multiple units" refers to a consumer good or service which is sold in a quantity of more than one of the same kind of good or service. This interpretation comports with the usual, ordinary meaning of the terms used in section 17504. "Multiple" is defined in the American Heritage Dictionary as "[h]aving, pertaining to or consisting of more than one individual, element, part, or other component[.]" (American Heritage Dict. (New College ed. 1981) p. 861, col. 2.) Such dictionary defines "unit" as "4. *Measurement.* A precisely specified quantity in terms of which the magnitudes of other quantities of the same kind can be stated." (American Heritage Dict., *supra*, p. 1400, col. 2.) The plain meaning of these words used together is that there is more than one quantity of the same kind of individual, element, part or component. When this meaning is read together with the singular words "good" and "service" used by the Legislature in section 17504, "multiple units" necessarily refers to more than one "good" or "service" of the same kind. Thus, we find no ambiguity arises from the language used by the Legislature in section 17504. Because we conclude the statutory language is unambiguous, we need not look at the legislative history behind section 17504 as "we presume the Legislature meant what it said and the plain meaning of the statute governs. [Citations.]" (*People v. Snook* (1997) 16 Cal.4th 1210, 1215.)

Plainly stated, section 17504 merely requires that the stated advertised price for the sale of a good or service of the same kind which is being offered only in "multiple

units" be that of the minimum unit of any good or service offered. The trial court therefore properly read section 17504 to apply only to the sale of multiple units of the same kind of good or service.

In this case, Bivens alleged in the first cause of action that Gallery violated section 17504 by advertising mattresses for sale for $48 with the qualification "TWIN EA. PC. (SOLD IN SETS ONLY)." Such allegation reveals that the mattresses were only sold in sets, which Bivens concedes is not the same as a unit. Because we have determined that the plain language of section 17504 refers only to the sale of multiple units of the same good or service, it does not apply to Gallery's advertisements for a "mattress" set,[8] which is commonly known to be made up of two different goods sold together, a mattress and box springs and not multiple mattresses or multiple box springs. Gallery's advertisements therefore do not violate section 17504 and the complaint cannot be amended to change this conclusion. The trial court thus properly sustained Gallery's demurrer to the first cause of action without leave to amend as a matter of law.

*B. The Second Cause of Action Under Section 17500*

Bivens argues the trial court erred in sustaining the demurrer to the second cause of action because the inquiry as to whether the advertisements were misleading cannot be made without evidence as to whether a significant portion of the general consuming public are likely to be deceived by the mattress advertisements placed in various newspapers by Gallery. He specifically claims the advertisements mislead the least

literate California consumers by making a false promise of savings and require them to engage in arithmetic in order to determine the actual amount of money they will have to spend. We conclude the trial court properly determined as a matter of law that the advertisements on their face would not be misleading to reasonable consumers.

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.[9] (See *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360 (*Echostar*).) "By [its] breadth, [section 17500] encompass[es] 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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8 The advertisements attached as Exhibits A though D of the complaint, do not even mention the word "mattress."

9 Section 17500 provides in pertinent part: "It is unlawful for any . . . corporation or . . . any employee thereof with intent directly or indirectly to dispose of . . . 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 in any other manner or means whatever, . . . , any statement, concerning that . . . personal property or those services, . . . 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 . . . 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 . . . so advertised at the price stated therein, or as so advertised . . . ."

the consumer, such as by failure to disclose other relevant information, is actionable under [section 17500]." (*Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 332-333.) Whether conduct or advertising is "misleading" under this statutory provision is determined by applying a "reasonable consumer" standard.[10] (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 509-510 (*Lavie*).)

The parties do not dispute the facts pertaining to Gallery's advertising in the Los Angeles Times or the wording of the advertisements attached to the complaint which list the terms and restrictions for the advertised price. As noted above, if the facts appearing in the attached advertisements contradict those alleged in the complaint, those facts in the advertisements take precedence. (*Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567-568.) Therefore, whether Gallery's advertisements are likely to mislead reasonable consumers is a question of law based on the attached advertisements. (See *Chern v. Bank of America* (1976) 15 Cal.3d 866, 872-873; see also *Lavie, supra*, 105 Cal.App.4th at p. 503.)

Although Bivens alleged the advertisements would mislead an average reasonable consumer because it was untrue Gallery would sell only one single twin size mattress or one single box springs and therefore as part of a scheme or plan Gallery did not intend to sell one unit of such merchandise at the advertised one-piece price, the advertisements

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10 As we noted earlier in denying Bivens's request for judicial notice of a literacy survey, his attempt to inject on appeal statistics to show that a significant number of consumers would have actually been deceived by Gallery's advertisements is improper. (See *ante*, fn. 4.) Bivens did not allege the advertisements targeted any particular

clearly stated on their face that Gallery would only sell at such price for each piece if the purchaser bought a set, i.e., "(SOLD IN SETS ONLY)." Therefore, the advertisements were not misleading or false, and the potential purchasers were, at the very least, on notice that the price was conditioned upon purchasing a set, which reasonable consumers purchasing mattresses understand to include two pieces, a mattress and box springs.

In addition, there was nothing confusing or misleading about the abbreviation "EA. PC." in the advertisements. Such abbreviation merely clarified for the reasonable consumer that each piece of the mattress set could be purchased at the advertised price of $48 when a set was bought. The advertisements thus gave adequate notice to potential purchasers of the price they would pay for a mattress set, which consisted of two different types of goods. Because the advertisements on their face could not mislead a reasonable consumer, and no amendment to the complaint could change this conclusion, the trial court properly sustained Gallery's demurrer to the second cause of action without leave to amend.

*C. The Third Cause of Action Under Section 17200*

Finally, Bivens contends the trial court erred in sustaining the demurrer to the third cause of action because the same unlawful advertising practices Gallery utilized as the basis for the first two causes of action also violated section 17200's provisions prohibiting unfair competition through the use of unfair, deceptive, untrue or misleading advertising. He further claims the advertisements violated Civil Code section 1770, subdivision

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disadvantaged or vulnerable group. Rather he specifically alleged the average reasonable consumer would be mislead by Gallery's advertisements.

(a)(9), which provides another basis for liability under section 17200. We conclude the trial court properly found Bivens had not alleged sufficient facts as a matter of law to show Gallery's advertisements were misleading and a violation of section 17200.

Section 17200 prohibits any unlawful, unfair, or fraudulent business acts or practices, including deceptive or misleading advertising prohibited pursuant to section 17500.[11] "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1143.) The general inquiry in a UCL action brought under section 17200 is whether the allegations demonstrate that the public is likely to be deceived by the challenged practices. (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 211.)

Because we have already determined Bivens's claims of false advertising practices arising from the advertisements attached to the complaint based on violations of sections 17500 and 17504 as alleged in the first two causes of action fail as a matter of law, they also are insufficient as a matter of law to "borrow" to provide unlawful, unfair or fraudulent conduct for a cause of action under section 17200.

Similarly, the advertisements do not violate Civil Code section 1770, subdivision (a)(9) of the Consumers Legal Remedies Act (CLRA), which proscribes "[a]dvertising

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11 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."

goods or services with intent not to sell them as advertised." As with sections 17500 and 17200, the test with CLRA claims is whether the subject advertisement is misleading to or likely to deceive a reasonable consumer. (*Echostar, supra*, 113 Cal.App.4th at p. 1360; *Lavie, supra*, 105 Cal.App.4th at pp. 506-510.) As noted earlier, the advertisements show on their face that Gallery would sell twin mattress sets at the price of $48 for each piece of a set, commonly understood as being comprised of two pieces, a mattress and box springs. The allegations of Bivens's complaint claim the advertisements were false and misleading because they offered one mattress at $48 for twin size when Gallery did not intend to sell that one unit of merchandise as advertised. However, nothing in the advertisements state or even suggest that the twin mattresses would be sold separate and apart from a set at the advertised price. A reasonable consumer would thus not be deceived into believing he or she could purchase only one mattress at the advertised price per piece for mattresses "SOLD IN SETS ONLY."

Because the advertisements were not unlawful, unfair or fraudulent under any of the alleged statutory sections, no violation of section 17200 has been stated. Nor in light of the attached advertisements can the complaint be amended to remedy such defect. The trial court, therefore, also properly sustained Gallery's demurrer to the third cause of action without leave to amend.

## CONCLUSION

In sum, Bivens lacks standing to pursue this action as a result of Prop. 64's amendment of sections 17204 and 17535. However, even if he did have standing to do so, the trial court properly sustained Gallery's demurrer without leave to amend as the

advertisements attached to the complaint show as a matter of law that Bivens cannot state a claim under sections 17200, 17500, or 17504 for false advertising and unfair business practices.

DISPOSITION

The judgment of dismissal is affirmed. Gallery is entitled to its costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| WEBSTER BIVENS,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>GALLERY CORPORATION,<br><br>Defendant and Respondent. | D045557<br><br>(Super. Ct. No. GIC832910)<br><br>ORDER CERTIFYING OPINION FOR PUBLICATION |

THE COURT:

The opinion filed November 22, 2005 is ordered certified for publication.

The attorneys of record are:

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Dorsey & Whitney, Steven D. Allison and Chris Humphreys for Defendant and Respondent.