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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RICHARD LYTWYN, Plaintiff and Appellant, v. FRY'S ELECTRONICS, INC., et al., Defendants and Respondents.	D042401 (Super. Ct. No. 787977)

APPEAL from an order of the Superior Court of San Diego County, Sheridan L. Reed, Judge. Reversed with directions.

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

Foley McIntosh Frey & Claytor, James D. Claytor and Kenneth W. Pritiken for Defendants and Respondents.

I.

INTRODUCTION

Plaintiff Richard Lytwyn appeals an order enjoining prosecution of this action against Fry's Electronics, Inc., and various individuals associated with Fry's (collectively

Fry's). The court granted the injunction preventing further prosecution of this case until the resolution of an appeal of a separate case involving Fry's and a corporation named Apex Wholesale, Inc. (Apex), entitled *Apex Wholesale, Inc. v. Fry's Electronics, Inc.* (Super. Ct. San Diego County, 2002, GIC 734991) (the *Apex* case).[1] The court enjoined this action pursuant to Code of Civil Procedure[2] section 526, subdivision (a)(6), which authorizes the granting of an injunction "to prevent a multiplicity of judicial proceedings."

Both this case and the *Apex* case include various claims against Fry's for unfair business practices, including claims seeking restitution for the general public pursuant to the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.).[3] Lytwyn testified as a witness for Apex in the *Apex* case regarding his purchase of a piece of computer equipment called a CD-Writer from Fry's in August 1999. After having the equipment installed on his computer, Lytwyn learned that the box in which the CD-Writer came had a sticker that indicated that the CD-Writer might have been returned

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1 Although the complaint in the *Apex* case involved individuals associated with Fry's other than those named in the complaint in this case, those individuals are not material for our resolution of this appeal. Therefore, we refer to all of the defendants in both cases as "Fry's" for ease of reference.

2 Unless otherwise specified, all subsequent statutory references are to the Code of Civil Procedure.

3 As discussed at greater length in part III(G), *post*, Proposition 64 (Prop. 64) significantly amended the Business and Professions Code. References to the Business and Professions Code are to the code as it existed *prior* to the effective date of Prop. 64, unless otherwise indicated.

by a previous purchaser or that it might be a refurbished item. The sticker had been obscured by another sheet of paper on the box. Lytwyn also testified that the CD-Writer did not work properly and that Fry's had failed to adequately respond to his complaints regarding the incident.

In this case, Lytwyn moved for summary adjudication of his claims that Fry's had violated Business and Professions Code section 17531 and that such conduct violated Business and Professions Code section 17200. Lytwyn's motion for summary adjudication was based on evidence that had been presented in the *Apex* case. The trial court concluded that this case should be enjoined pending resolution of the appeal in the *Apex* case because Lytwyn had become "so identified with the matters litigated" in the *Apex* case that "[t]his action, in so far as it seeks to recover on behalf of 'all others' or the 'public' would be a mere rehash of parts of the *Apex* matter."

Lytwyn claims the trial court erred in enjoining prosecution of this case pending the resolution of the appeal in the *Apex* case because he is not in privity with Apex. We agree and reverse the order.

While Lytwyn's appeal was pending, the voters of California passed Prop. 64, a measure that amended certain provisions of the UCL (Bus. & Prof. Code, § 17200 et seq.) and the False Advertising Law (Bus. & Prof. Code, § 17500 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 has on this case, and heard further argument on these issues.

We conclude that Prop. 64's amendments of Business and Professions Code sections 17203, 17204 and 17535 (see Bus. & Prof. Code, §§ 17203, 17204, 17535 as amended by Prop. 64, as approved by voters, Gen. Elec. (Nov. 2, 2004)), do apply to this case, and require that we direct the trial court to grant judgment on the pleadings in favor of Fry's with respect to Lytwyn's representative claims on behalf of the general public. We also direct the trial court to grant Lytwyn leave to amend his complaint to comply with the Business and Professions Code as amended by Prop. 64.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Apex case*

In November 1999, Apex, a seller of computer equipment, filed a second amended five-count complaint against Fry's. Apex claimed Fry's had violated the Unfair Practices Act (Bus. & Prof. Code, §§ 17040, 17044, 17070), committed intentional and negligent interference with prospective advantage, published false advertising (Bus. & Prof. Code, § 17500), and violated the UCL. Apex sought damages on behalf of itself and the general public.

In June 2001, the court held a bifurcated trial on four of Apex's claims.[4] Prior to the commencement of the trial, the court ruled that evidence admitted in the first phase would also be admitted in the second phase, and that the parties would be allowed to

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4 Apex apparently dismissed its negligent misrepresentation claim before the trial, although this is not entirely clear from the record in this case.

present additional evidence during the second phase. The court then held a jury trial on Apex's legal claims, namely, its Unfair Practices Act claim and its claim of intentional interference with prospective advantage. During the jury trial, Lytwyn testified for Apex regarding his experience in purchasing a CD-Writer from Fry's in August 1999. The jury returned a verdict in favor of Fry's on all of Apex's legal claims.

Between the first and second phases of the trial, Apex moved to amend its complaint to conform to the proof presented during the first phase of the trial. Apex proposed to amend its complaint to specifically allege that Fry's had violated Business and Professions Code section 17531 by advertising used goods as new. Apex acknowledged that its existing complaint alleged that Fry's advertised "secondhand or refurbished goods as new," but noted that the complaint did not specifically allege a violation of Business and Professions Code section 17531. Apex contended that the trial testimony of Lytwyn and other witnesses demonstrated that Fry's had violated Business and Professions Code section 17531. Fry's opposed the motion to amend. The trial court denied the motion.

The second phase of the trial was a court trial on Apex's false advertising and UCL claims. In October 2001, the court issued a statement of intended decision in which it denied Apex relief on all of its claims. In September 2002, the trial court issued a statement of decision and a judgment in favor of Fry's on all of Apex's claims, with the exception of one portion of Apex's complaint not relevant here. In its statement of decision, the trial court did not expressly address Business and Professions Code section 17531.

Apex filed a motion for a new trial in which it argued that the court had failed to make findings as to Fry's alleged violation of Business and Professions Code section 17531. The trial court denied the motion for new trial. Apex's appeal is currently pending in this court. (*Apex Wholesale, Inc. v. Fry's Electronics, Inc.* (D041383).)

B. *Lytwyn's complaint in this case*

In May 2002, Lytwyn filed a five-count complaint alleging that Fry's had failed to honor its warranty obligations, sold used goods as new, advertised used goods as new, published misleading advertising, and engaged in unfair competition. In particular, Lytwyn alleged that on August 6, 1999, Fry's had advertised various goods as being on sale when the goods were either not actually on sale, or were offered at a reduced price because they were not first quality goods. Lytwyn claimed he purchased a CD-Writer in response to the August 6 advertisement and that after purchasing the CD-Writer, he discovered that Fry's had failed to adequately disclose that the CD-Writer had been returned by a previous customer and that it did not work properly. Lytwyn also alleged that Fry's had published an advertisement on November 15, 1999, for a particular type of computer scanner, but that consumers who responded to the advertisement were sold an inferior product.

Lytwyn alleged that Fry's conduct violated the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790), the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.), and Business and Professions Code sections 17200, 17500, and 17531. Lytwyn sought numerous forms of relief including "restitution to identifiable victims, including plaintiff, among the general public . . . ."

C. *Fry's efforts to prevent this action from proceeding pending resolution of the Apex case*

In May 2002, Fry's filed a notice of related case and request for reassignment in this case. Fry's requested that this case be reassigned to the trial judge who presided over the *Apex* case. Lytwyn opposed the request. The case was not reassigned. In June, Fry's filed an ex parte application for an order staying this case and reassigning it to the trial judge who presided over the *Apex* case. Although the record does not contain the minute order, it is undisputed that the trial court denied the application.

Shortly thereafter, Fry's moved to stay this action pending resolution of the *Apex* case. In July, the trial court issued a tentative ruling granting the motion. The court held oral argument on the motion in early August. After oral argument, the court denied the motion without prejudice.

On August 23, Fry's filed a renewed motion to stay this case. On August 27, Fry's filed an ex parte application in the *Apex* case requesting that the trial court in that case assume jurisdiction over this case. On September 9, the court in the *Apex* case denied Fry's request.

On November 1, 2002, the trial court in this case issued a tentative ruling denying Fry's August 23 motion for a stay. On November 22, the trial court held a hearing on the motion to stay and denied the motion. However, during the hearing, after Fry's counsel presented its arguments as to why the court should enjoin this action, the court said that although it did not believe a stay was appropriate at that time, it would "deal with it . . . on an as-needed basis."

In December 2002, Lytwyn filed a motion for summary adjudication of his claim that Fry's had violated Business and Professions Code section 17531 and his claim that such conduct violated Business and Professions Code section 17200. In his motion, Lytwyn claimed Fry's had violated Business and Professions Code section 17531 by failing to disclose in its advertisements that some of the items it was offering for sale were customer returns or open box items, and by failing to sufficiently indicate the used nature of goods at the time of sale. Lytwyn claimed such conduct violated Business and Professions Code section 17200, and requested that the court order Fry's "to locate and to provide restitution to all person[s] sold returned merchandise, where Fry's did not publish a disclaimer within the advertising indicating that the merchandise was a customer return."

In support of his motion for summary adjudication, Lytwyn relied on evidence from the *Apex* case. He submitted trial transcripts of the testimony of a Fry's employee and a consumer witness from the *Apex* case, as well as the transcript of the deposition of a former Fry's employee taken in the *Apex* case. In addition, in support of his motion for summary adjudication in this case, Lytwyn offered a declaration in which he related his experience in purchasing the CD-Writer. The declaration was virtually identical to his trial testimony in the *Apex* case.[5]

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5 Lytwyn's trial testimony in the *Apex* case was lodged by Fry's in the trial court in this case.

In February 2003, Fry's filed a motion entitled, "Motion for Preliminary Injunction and Stay to Prohibit Conflicting and Vexatious Litigation Based on Changed Facts or Alternatively, Motion for Reconsideration of November 22, 2002 Order Denying Motion for Preliminary Injunction/Stay." In its motion, Fry's argued that Lytwyn's motion for summary adjudication demonstrated that he was seeking to litigate the same issues that had already been litigated and decided in the *Apex* case, using the same evidence. Fry's argued that although Lytwyn was not a party in the *Apex* case, he "was 'virtually represented' by Apex and Apex's attorneys in the *Apex* case with respect to the [Business and Professions Code] [s]ection 17531 claim." Fry's supported its motion with various documents it lodged in this case that were taken from the *Apex* case.

D. *The trial court's May 22, 2003 order*

On May 22, 2003, the trial court entered an order that provided in relevant part:

"On April 4, the Court granted Defendant's Motion for Reconsideration and took under submission the issue of whether an injunction should be granted and a stay issued for the case entitled *Lytwyn v. Fry's et al* . . . pending the Court of Appeal's ruling in the case entitled *Apex v. Fry's et al*.

"Defendant's Motion for Preliminary Injunction/Stay and Reconsideration was brought February 7, 2003 related to the Court's ruling on November 2, 2002[6] and is GRANTED on the ground that the Plaintiff should be enjoined from going forward in the

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6 The court's reference to its order on November 2, 2002, was apparently a typographical error. The court had previously denied Fry's motion for a preliminary injunction on November 22, 2002.

Lytwyn matter until such time as the issues on appeal in the *Apex* matter are resolved, and more particularly, the issues to which I am referring are those relating to the causes of action alleged by Lytwyn under the Consumer Legal Remedies Act and issues of Unfair Competition, Unfair Practices and [Business and Professions] Code Sec[tion] 17531 as it relates the acts [*sic*] just cited. [¶] . . . . [¶]

"When Mr. Lytwyn brought his motion for Summary Adjudication it was a surprise to discover that the declaration of Mr. Lytwyn in support of the motion for summary judgment was almost identical to the declaration of Mr. Lytwyn filed in the *Apex* matter. Moreover, all of the other evidence offered in support of the motion was testimony from the *Apex* matter—either trial or deposition testimony. A review of that testimony (lodged documents) together with the testimony of Mr. Lytwyn during the *Apex* trial (also lodged) reveals that the exact same facts were placed before Judge Enright in the *Apex* matter. Mr. Lytwyn, now in control of the litigation has chosen not to expand the subject and scope of his former testimony and offer of evidence.

"A review of Judge Enright's Statement of Decision following the trial (lodged with this court) reflects that Judge Enright found all the lay witnesses credible. That means, Judge Enright believed Mr. Lytwyn's testimony elicited in the *Apex* matter. Nonetheless, he denied relief. This action, insofar as it seeks to recover on behalf of 'all others' or the 'public' would be a mere rehash of parts of the *Apex* matter.

"Discussion was had early on in this case regarding Mr. Lytwyn's personal, individual claims which occurred in 1999 and which he alleged in the complaint at issue. On August 2, 2002 discussing the issue of an injunction, the court asked counsel for

Defendant if he was asserting that Mr. Lytwyn should be prevented from bringing his own personal claims by reason of his having testified relating to those claims in *Apex*. [Citation.]

"At that point [plaintiff's counsel], on behalf of Lytwyn indicated that the plan was to proceed 'on behalf of the public' and not merely for Mr. Lytwyn's personal and unique damages. That being the case, I find Plaintiff in the matter of *Lytwyn v. Fry's Electronics Inc., et al.* (GIC 787977) is so identified with the matters litigated in *Apex v. Fry's et al* (GIC 734991) that upon reconsideration I am granting the injunctive relief requested by Defendants under [Civil Code of Procedure] [s]ection 526 [, subdivision] (a)(6). The action numbered GIC 787977 is stayed, and counsel are enjoined from proceeding with or prosecuting that action, pending the outcome of the appeal in GIC 734991 or until further order of this court."

III.

DISCUSSION

A. *Requests for judicial notice*

The parties have requested that this court take judicial notice of various documents in our resolution of this appeal. We deny Fry's May 21, 2004 request to take judicial notice of this court's entire file in the appeal in the *Apex* case. Fry's overly broad request fails to provide any specificity as to the relevance of these documents to the resolution of this appeal. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [matter to be judicially noticed must be relevant to a material issue] (*Mangini*).)

We grant Lytwyn's December 29, 2003 unopposed request to take judicial notice of specified documents from the *Apex* case relating to Fry's efforts to enjoin and/or stay prosecution of this case.

We grant Lytwyn's December 29, 2003 request—which Fry's opposes—to take judicial notice of documents related to a failed legislative attempt to amend the UCL. The materials are properly subject to judicial notice and may be relied on in interpreting the UCL. (Evid. Code, § 452, subd. (c) ["official acts"]; *Stop Youth Addiction, Inc. v. Lucky Stores*, *Inc*. (1998) 17 Cal.4th 553, 570 ["Consistently, just last term, the Legislature rejected several pieces of proposed legislation designed to restrict UCL standing in various ways"].)

Finally, we deny Lytwyn's August 10, 2004 request to take judicial notice of a contempt order and a decision regarding a nonsuit issued in the *Apex* case, and the complaint filed in a separate action entitled *Bivens v. Fry's Electronics, Inc. et al.* (Super. Ct. San Diego County, 2002, No. GIC 789990) because these documents are not relevant to the issues in this appeal. (*Mangini, supra,* 7 Cal.4th at p. 1063.)

B. *The trial court's April 4, 2003 ruling granting Fry's motion for reconsideration and the court's May 22, 2003 order granting a preliminary injunction are properly before this court*

Lytwyn filed a notice of appeal challenging the trial court's May 22, 2003 order granting Fry's motion for preliminary injunction and stay. In addition, in his brief in this court, Lytwyn challenges the trial court's April 4, 2003 ruling granting Fry's motion for reconsideration. We consider whether these rulings are reviewable under the circumstances of this case.

1. *The May 22, 2003 order*

The May 22, 2003 order provided that the trial court was "granting the injunctive relief requested by Defendants under . . . section 526 [subdivision](a)(6)." The order also provided that "[t]he action numbered GIC 787977 is stayed, and counsel are enjoined from proceeding with or prosecuting that action . . . ."

"An order granting a preliminary injunction is an appealable order." (*Waremart Foods v. United Food and Commercial Workers Union, Local 588* (2001) 87 Cal.App.4th 145, 148, fn. 1; § 904.1, subd. (f).) However, "an order staying proceedings in the same action is *not* an appealable order." (*Bailey v. Fosca Oil Co.* (1962) 211 Cal.App.2d 307, 308 (*Bailey*), italics added.)

In *Bailey*, the respondent moved to dismiss an appeal on the ground that the appeal was taken from a nonappealable order staying a case. (*Bailey, supra*, 211 Cal.App.2d at p. 307.) The order provided, "It is ordered by the Court that the motion for order staying prosecution and extending time to plead be, and it is hereby granted, *and the plaintiff shall not apply for a default* and the defendant shall not be required to file any pleading until ten (10) days after the defendant's motion for security under Corporations Code section 834 is disposed of." (*Bailey, supra*, at p. 308.) The *Bailey* court noted that "when the propriety of an appeal is not free from dubiety, the better practice is to deny the motion to dismiss and permit the appeal to be determined on the merits." (*Id*. at p. 309.) The court broadly construed the restraint preventing the plaintiff from applying for a default as an appealable injunction, and denied the motion to dismiss. (*Ibid*.)

In this case, Fry's motion was expressly styled as a motion for an injunction or, in the alternative, a motion to stay the case. Further, the trial court expressly stated it was granting an "injunction," and cited the statutory provision authorizing the issuance of injunctions. (§ 526.) Under these circumstances, we conclude that the trial court's May 22, 2003 order is appealable as an injunction pursuant to section 904.1, subdivision (f).

2. *The April 4, 2003 ruling*

Fry's claims that the April 4, 2003 ruling[7] is not within the scope of this appeal because Lytwyn did not refer to that ruling in his notice of appeal.

The April 4, 2003 ruling granting reconsideration was not itself an appealable order. (See § 904.1.) However, section 906 provides, "Upon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and *any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from* or which substantially affects the rights of a party, including, on any appeal from the judgment, any order on motion for a new trial, and may affirm, reverse or modify any judgment or order appealed from and may direct the proper judgment or order to be entered, and may, if necessary or proper, direct a new trial or further proceedings to be had." (Italics added.)

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7 We note that the record in this case does not contain the court's April 4, 2003 ruling and it is unclear whether a formal ruling was actually entered in the trial court file. In any event, the record is adequate to review this claim because the court's May 22, 2003 order refers to the April 4, 2003 ruling granting Fry's motion for reconsideration.

We concluded above that the trial court's May 22, 2003 order is an appealable order pursuant to section 904.1, subdivision (a)(6). Further, in its May 22 order, the court stated, "On April 4, 2003, the Court granted Defendant's Motion for Reconsideration and took under submission the issue of whether an injunction should be granted . . . ." Thus, the April 4, 2003 ruling "necessarily affects" the May 22, 2003 order. (§ 906.) Pursuant to section 906, the April 4, 2003 nonappealable ruling granting reconsideration was reviewable in Lytwyn's appeal from the May 22, 2003 appealable order granting injunctive relief. Further, a notice of appeal from an appealable order need not specify prior nonappealable rulings. (*Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal.App.4th 662, 668-669.) Therefore, Lytwyn was not required to specify the April 4, 2003 ruling in his notice of appeal from the May 22, 2003 order. Accordingly, we conclude the April 4, 2003 ruling is reviewable in this appeal.

C. *The trial court did not err in issuing its April 4, 2003 ruling granting Fry's motion for reconsideration*

Lytwyn claims the trial court improperly granted Fry's motion to reconsider its November 22, 2002 motion because the motion was untimely and because it was not based on "new or different facts, circumstances, or law." (§ 1008, subds. (a), (b).)

Fry's brought its motion for reconsideration pursuant to section 1008, subdivisions (a) and (b):

"(a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of

entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.

"(b) A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion."

Section 1008, subdivision (b) does not contain a time limitation. Accordingly, Fry's motion for reconsideration was not untimely if it met the requirements set forth in section 1008, subdivision (b).[8]

Fry's motion was premised on Lytwyn's motion for summary adjudication in this case, which was filed on December 31, 2002. Fry's previous motion for a preliminary

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8 Therefore, we need not consider Fry's alternative argument that its motion for reconsideration was also timely under section 1008, subdivision (a) on the ground that the 10-day period specified in that subdivision is inapplicable in this case because Fry's never received notice of entry of the court's November 22, 2002 order denying its previous motion for a preliminary injunction.

injunction was denied on November 22. Fry's motion was clearly based on "new or different facts. . . " since the basis for its motion—Lytwyn's motion for summary adjudication with its supporting documents—had not been filed at the time the motion for a preliminary injunction was brought and denied. (§ 1008, subd. (b).) Accordingly, we reject Lytwyn's claim that the trial court erred in granting Fry's motion to reconsider its November 22, 2002 order.

D. *The trial court was not authorized to enjoin this action pursuant to the rule of exclusive concurrent jurisdiction because Lytwyn was not in privity with Apex*

Section 526, subdivision (a)(6) provides that an injunction may be granted "[w]here the restraint is necessary to prevent a multiplicity of judicial proceedings." Lytwyn claims the trial court improperly enjoined this action pursuant to section 526, subdivision (a)(6) because the *Apex* case cannot have any res judicata effect in this case. Fry's claims the trial court was empowered to enjoin this action pursuant to section 526, subdivision (a)(6), which is a subset of the rule of exclusive concurrent jurisdiction. Fry's notes that "[t]he established rule of 'exclusive concurrent jurisdiction' provides that where two (or more) courts possess concurrent subject matter jurisdiction over a cause, the court that first asserts jurisdiction assumes it to the exclusion of all others, thus rendering 'concurrent' jurisdiction 'exclusive' with the first court." (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1175.) Fry's contends that because Lytwyn's interests are being vindicated in the *Apex* case, pursuant to the rule of exclusive concurrent jurisdiction, Lytwyn may not bring a second action seeking to litigate those same interests in this case.

Fry's acknowledges that "a Trial Court's ability to stay an action on the basis of the doctrine of exclusive concurrent jurisdiction is predicated upon the court's finding of privity between the plaintiff in the action to be stayed and the plaintiff in the prior action . . . ." Fry's contends that the trial court properly concluded Lytwyn was in privity with Apex.

We conclude Lytwyn was not in privity with Apex, and that the trial court was therefore not authorized to enjoin this action pursuant to the rule of exclusive concurrent jurisdiction.[9]

1. *Standard of review*

Ordinarily, we review an order granting a preliminary injunction for an abuse of discretion. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1136.) "Of course, questions underlying the preliminary injunction are reviewed under the appropriate standard of review. Thus, for example, issues of fact are subject to review under the substantial evidence standard; issues of pure law are subject to independent review." (*Id*. at pp. 1136-1137.)

As Fry's acknowledges, the trial court's granting of a preliminary injunction in this case rested upon its implied conclusion that Lytwyn was in privity with Apex. Specifically, the court concluded, "Plaintiff in [this case] is so identified with the matters litigated in *Apex v. Fry's, et. al* (GIC 734991) that upon reconsideration I am granting the

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[9] Accordingly, we need not consider Lytwyn's other arguments regarding why the trial court erred in enjoining this case pursuant to section 526, subdivision (a)(6).

injunctive relief requested by the Defendants under . . . section 526[, subdivision](a)(6)." "We review the court's conclusion of privity de novo . . . because the issue, which ultimately involves the requisites and limits of due process, is a legal one." (*Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal.App.4th 454, 464.)

We reject Fry's argument that the question whether privity exists in this case is reviewable as an issue of fact. Fry's contends that the substantial evidence standard applies because the trial court's conclusion regarding privity was premised upon its factual assessments regarding "the *credibility* of [plaintiff's counsel's] and Mr. Lytwyn's protestations that privity did not exist, and of [plaintiff's counsel's] *motivations* in bringing this Action in the name of Mr. Lytwyn." With regard to the trial court's purported credibility determinations, the trial court's rejection of arguments regarding the applicability of privity in this case does not create a question of fact. With regard to plaintiffs counsel's motivations, the trial court did *not* find that this litigation was a sham in which plaintiff's counsel, rather than Lytwyn, was in fact the person bringing this action.

Further, even assuming the trial court had made factual determinations in reaching its conclusion that Lytwyn was in privity with Apex, the question of the applicability of privity in this context is ultimately a legal one, which we review de novo. (*Victa v. Merle Norman Cosmetics, Inc.*, *supra*, 19 Cal.App.4th at p. 464.) The cases Fry's cites in favor of the proposition that privity determinations are reviewable for substantial evidence are distinguishable in that they concerned the concept of privity of *contract* (*Zirker v. Barker*

(1958) 161 Cal.App.2d 355, 359; *Rogers v. Whitson* (1964) 228 Cal.App.2d 662, 671), rather than privity in the context of exclusive concurrent jurisdiction, as in this case.

2. *Lytwyn was not in privity with Apex*

a. *The concept of privity*

"The doctrine of res judicata rests upon the ground that the party to be affected, *or some other with whom he is in privity*, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent." (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n* (1998) 60 Cal.App.4th 1053, 1065 (*COAST*), italics added.)

"The concept of privity for the purposes of res judicata or collateral estoppel[10] refers 'to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of the doctrine of collateral estoppel. [Citations.]' [Citations.] ' "This requirement of identity of parties or privity is a requirement of due process of law."

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10 We have not found any cases that discuss the concept of privity in the context of exclusive concurrent jurisdiction. However, in view of the fact that the rule of exclusive concurrent jurisdiction seeks to prevent the possibility of "conflicting judgments" (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising, supra*, 85 Cal.App.4th at p. 1175), the case law discussing privity in the context of preclusion is instructive. We also note that the parties have relied on cases that discuss privity in the preclusion context.

[Citation.] "Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the . . . party in the first action. [Citations.] The circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication. . . ." ' [Citations.]

"Our Supreme Court has recognized that: 'Privity is not susceptible of a neat definition, and determination of whether it exists is not a cut-and-dried exercise. [Citations.]' [Citations.] In the final analysis, the determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate. [Citation.] ' "Whether someone is in privity with the actual parties requires close examination of the circumstances of each case." [Citation.]' [Citation.]" (*COAST, supra,* 60 Cal.App.4th at pp. 1069-1070.)

b. *Lytwyn's participation in the Apex case is not a sufficient basis upon which to premise a finding of privity between Lytwyn and Apex*

In *Lynch v. Glass* (1975) 44 Cal.App.3d 943, 946 (*Lynch*), the Court of Appeal considered whether a prior action decided in favor of the defendants precluded the plaintiffs from bringing an action seeking a public easement to a road. In the prior case, two corporations claimed a road was subject to a public easement. The judgment in the prior case determined that "the public had [no] recorded interest in the road." (*Lynch*, *supra*, 44 Cal.App.3d at p. 946.) Although the plaintiffs in the *Lynch* action were not parties to the prior case, one of the plaintiffs in the *Lynch* action had appeared as a witness in the prior case.

The *Lynch* court concluded that the plaintiffs were not bound by the prior litigation because the *Lynch* plaintiffs were not in privity with the corporations in the prior case. The court reasoned:

"Appellants were apparently identified in interest with the two corporations in the [prior] case, with a view to developing their respective properties and establishing public access thereto. Appellants' side of the underlying dispute was urged by the corporations at trial and on appeal. [Citation.] . . . Although appellants were fully aware of the prior litigation, the appearance of one of them as a witness gave them no power to control any aspect of the case. [Citations.] Moreover, appellants did not stand in a relationship with the two corporations which would put them on reasonable notice that they avoided the prior proceedings at their peril. [Citation.]

"It is true that the corporations asserted public rights to the roadway and that appellants stood to gain from any determination in the corporations' favor. If the first lawsuit had involved the City of Sausalito, which is in a position to safeguard the rights of the public, appellants might be precluded from asserting that a determination adverse to the city should not be binding upon them (see *Rynsburger v. Dairymen's Fertilizer Coop., Inc.,* [1968] 266 Cal.App.2d 269 [*Rynsburger*]). But collateral estoppel cannot fairly be applied on that basis against appellants in this action. Appellants are entitled to present at trial their claim that the road is subject to a public easement." (*Lynch*, *supra*, 44 Cal.App.3d at pp. 949-950.)

Lytwyn testified as a witness in the *Apex* case regarding the same facts upon which he based his motion for summary adjudication in this case. However, Fry's

presented no evidence that Lytwyn controlled the *Apex* case or that he had a relationship with Apex sufficient to put him on notice that the *Apex* case would serve as an adjudication of his individual or representative claims against Fry's. Therefore, Lytwyn's mere appearance as a witness in the *Apex* case was not sufficient to create privity between him and Apex. (*Lynch, supra*, 44 Cal.App.3d at pp. 949-950.)

The fact that Lytwyn was a witness in a representative UCL action brought by Apex asserting rights on behalf of the general public does not change the result. Under the UCL, prior to the passage of Prop. 64, " 'a private plaintiff who has himself suffered no injury at all may sue to obtain relief for others.' [Citations.]" (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc., supra,* 17 Cal.4th at p. 561.) In proving such a claim, plaintiffs were "entitled to introduce evidence not only of practices which affect them individually, but also similar practices involving other members of the public who are not parties to the action." (*Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548, 564.)

Thus, prior to the passage of Prop. 64, Apex was entitled to prosecute its representative UCL action by presenting evidence of injuries suffered by members of the general public, including Lytwyn. However, Fry's has not cited, and we have not found, any cases that state that the first court to gain jurisdiction over a representative UCL claim has exclusive jurisdiction over all claims that members of the general public might bring regarding rights or interests at issue in the representative action. Fry's specifically acknowledges that "[t]he trial court's stay order in no way suggests that other members of the general public whose rights or interests were at issue in the Apex Case would be . . . precluded from acting as plaintiffs in a new 17200 action based on those same

rights and interests." Thus, Fry's argument is, essentially, that Lytwyn's participation as a trial witness for the plaintiff in the *Apex* case precludes him from bringing this action. For the reasons stated above, we reject this contention.

We also reject Fry's argument that *Rynsburger, supra,* 266 Cal.App.2d 269 and *COAST*, *supra*, 60 Cal.App.4th 1053 support the conclusion that Lytwyn was in privity with Apex. The courts' conclusions regarding privity in those cases were based on the fact that a public entity had represented a private litigant's interests in a former action. (See *Lynch, supra*, 44 Cal.App.3d at p. 950 [distinguishing *Rynsburger* on this basis].) For example, in *Rynsburger* the court stated, "Where statutory authority to sue has been given specifically to a public entity by statute, a judgment rendered therein is res judicata as to *all* members of the class represented. [Citation.] Therefore, citizens and residents, to the extent they are in privity with or represented by the city or state, are bound by judgments against the governmental body." (*Rynsburger*, *supra*, 266 Cal.App.2d at pp. 277-278.) Similarly, in *COAST*, the court noted, "We are persuaded that appellant, along with the public as a whole, was adequately represented by the state agencies vested with authority to litigate the issue of public access to the Bolinas Sandspit." (*COAST, supra*, 60 Cal.App.4th at p. 1070.) This case, in contrast, involves no action taken by public authorities authorized to represent the general public.

In summary, Lytwyn had no control over the *Apex* case and could not "reasonably have expected to be bound by the prior adjudication," merely because he was a witness in that case. (*COAST*, *supra*, 60 Cal.App.4th at p. 1070.) Further, Apex's use of Lytwyn's testimony to prosecute its representative UCL action on behalf of the general public does

not preclude Lytwyn's use of evidence from the *Apex* case to prosecute his UCL action in this case. We conclude Lytwyn was not in privity with Apex.[11]

E. *The trial court was not authorized to enjoin this action to protect Fry's from vexatious litigation or to prevent the impairment of the judgment in the Apex case*

Fry's argues that the trial court was authorized to enjoin this action to prevent "[plaintiff's] counsel's multi-prong strategy to relitigate the rulings that Judge Enright made in the *Apex* case on their private attorney general claims against Fry's." We concluded in part III(D), *ante*, that Lytwyn is not precluded by his participation in the *Apex* case from bringing this action. The fact that Lytwyn and plaintiffs in the other actions against Fry's have chosen to retain Apex's counsel to pursue their other claims does not render such suits vexatious.[12]

Fry's also claims the court was authorized to enjoin this action in order to prevent possible impairment of its judgment in the *Apex* case. Fry's contends that the *Apex* case is a quasi in rem procedure because Apex sought restitutionary relief. Fry's maintains that allowing this action to go forward presents the possibility of "conflicting rulings regarding possession of the same identifiable property." Fry's acknowledges that this

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11 We note that Lytwyn's complaint also contained claims under the Consumer Legal Remedies Act and the Song-Beverly Consumer Warranty Act. However, the trial court enjoined Lytwyn's entire action. In light of our conclusion regarding the privity issue, we need not address Lytwyn's argument that it was improper to stay these causes of action because they were not at issue in the *Apex* case.

12 Fry's filed a declaration in support of its February 2003 motion for preliminary injunction and stay that stated that there were several pending actions against Fry's being prosecuted by the same lawyers who represented Apex in the *Apex* case and Lytwyn in this case.

argument is contingent upon the plaintiff in the second matter having "had a fair opportunity to have its claims regarding the property heard in the first action" and that this "concern is satisfied by a showing of privity." We concluded in part III(D), *ante*, that Lytwyn is not in privity with Apex. Thus, even if the *Apex* case were a quasi in rem proceeding akin to the real property cases on which Fry's bases this claim, Fry's claim would fail.

F. *The trial court was not empowered to stay this action pursuant to its inherent authority to exercise control over its proceedings*

Fry's also contends that the trial court was empowered to stay this action pursuant to its inherent discretionary power to control its own proceedings. The only argument Fry's offers in support of this claim is that "the collateral estoppel effect of the judgment in the *Apex* case, if upheld on appeal, will render this [a]ction moot . . . ."

Among the requirements for the application of collateral estoppel is that "the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201, fn. 1.) It is undisputed that Lytwyn was not a party to the *Apex* case and we have concluded in part III(D), *ante*, that Lytwyn was not in privity with Apex. Therefore, the judgment in the *Apex* case cannot have collateral estoppel effect against Lytwyn. Accordingly, the trial court was not authorized to stay Lytwyn's action on this basis.

G. *Prop. 64's amendments to the Business and Professions Code apply to this case and require that the trial court grant judgment on the pleadings in favor of Fry's and allow Lytwyn to amend his complaint*

1. *Prop. 64*

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

Prop. 64 amended certain provisions of the UCL and the False Advertising Law (See Bus. & Prof. Code, §§ 17203, 17204, 17535 as amended by Prop. 64.) Prop. 64 amended Business and Professions Code section 17204 to require that actions filed by private persons pursuant to the UCL be brought only by plaintiffs who have suffered injury in fact: "Actions for any relief pursuant to this chapter shall be prosecuted . . . by any person ~~acting for the interests of itself, its members or the general public~~ *who has suffered injury in fact and has lost money or property as a result of such unfair competition*." (Bus. & Prof. Code, § 17204, as amended by Prop. 64, deletions in strikethrough, additions in italics.)

Prop. 64 also amended Business and Professions Code section 17203 to state that a private party may bring a representative action only if that person has suffered injury in fact and has complied with the class action certification requirements set forth in section 382: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair

competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. *Any 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* . . . ." (Bus. & Prof. Code, § 17203, as amended by Prop. 64, additions in italics.)

Similarly, Prop. 64 amended the False Advertising Law to state that a private plaintiff may bring a representative action under that statute only if that person has suffered injury in fact and has complied with class action certification requirements: "Actions for injunction under this section may be prosecuted by . . . any person ~~acting for the interests of itself, its members or the general public~~ *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*. . . ." (Bus. & Prof. Code, § 17535, as amended by Prop. 64, deletions in strikethrough, additions in italics.)

After the voters approved Prop. 64, we requested that the parties in this case 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?

2. *Prop. 64 applies to cases that were filed before the effective date of the new law*

In *Bivens v. Corel Corp.* (February 18, 2005, D043407) ___Cal.App.4th. ___, slip opinion at pages 11-12 (*Bivens*), we outlined the law applicable in determining whether Prop. 64 applies to pending cases:

"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.) 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* [*v. Ranger Ins. Co.* (1995)] 34 Cal.App.4th [1140,] 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*).)"

In *Bivens*, we looked to this authority in determining whether Prop. 64's amendment to the injury in fact requirements in section 17204 applied to pending cases. (*Bivens*, slip. op. at pp. 12-16.) We noted that the right of a plaintiff who has not suffered injury in fact to state a claim for unfair, unlawful or fraudulent business practices against a defendant was wholly dependent upon the UCL. (*Bivens*, slip. op. at p. 12.) Prop. 64 repealed the provision in the UCL that had granted standing to plaintiffs who had not suffered injury in fact. (*Bivens*, slip. op. at p. 14.) Under these circumstances, we concluded that the amendment to Business and Professions Code section 17204 contained in Prop. 64 pertaining to the injury in fact requirement applies to pending cases. (*Bivens*, slip. op. at pp. 15-16.)

The reasoning employed by this court in *Bivens* also applies to the Prop. 64's amendments to the Business and Professions Code at issue in this case. The right of a plaintiff to bring a representative action on behalf of the general public without satisfying

the class action requirements in section 382 was based on former Business and Professions Code section 17204. (See *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 110 [holding that under Civil Code section 3369, the statutory antecedent to former Business and Professions Code section 17204, "any member of the public to sue on his own behalf or on behalf of the public generally"].) In *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, the court described the difference between a representative action under Business and Professions Code section 17204 and a class action as follows: "'[A] representative action under the UCL is different from a class action. In a representative action under Business and Professions Code section 17204, a private plaintiff is permitted to pursue the injunctive and restitution relief provided by the UCL on behalf of the public without showing that he was directly harmed by the defendant's business practices. [Citation.] In a class action a plaintiff sues on his own behalf as well as on behalf of members of the class and the class must be certified under the provisions of Code of Civil Procedure section 382. [Citation.]" (*Massachusetts Mutual Life Ins. Co. v. Sup. Ct., supra*, 97 Cal.App.4th at p. 1290, fn. 3; accord, *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 657-672 [discussing distinctions between representative claims under the UCL and class actions].)

It is clear that the right to bring a representative action under section 17204 was a purely statutory right and was not a codification of prior common law rights. In *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 (*Bank of the West*), the California Supreme Court explained that the common law of unfair competition required a showing of competitive injury to one's business. The *Bank of the West* court noted that such a

showing was not required by statutes prohibiting unfair competition: "[S]tatutory 'unfair competition' extends to all unfair and deceptive business practices. For this reason, the statutory definition of 'unfair competition' 'cannot be equated with the common law definition . . . .'" (*Ibid.*) Thus, while competitive injury in fact was required at common law, former Business and Professions Code section 17204 provided a right of action without such a requirement.

In addition, the UCL originated from former Civil Code section 3369, which was an "*exception* to the common law rule that violations of the criminal laws cannot be enjoined." (Stern, Unfair Business Practices and False Advertising Bus. & Prof. Code § 17200 (The Rutter Group 2004) ¶ 2:4, p. 2-2, italics added; see *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129 (*Kraus*) [noting that former Civil Code section 3369 is statutory antecedent to the UCL].) In 1933, former Civil Code section 3369 was amended to provide that an action could be brought "by any person acting for the interests of itself, its members, or the general public." (*Kraus*, *supra*, 23 Cal.4th at p. 130, citing Stats. 1933, ch. 953, § 1, p. 2482.) Thus, the right to bring a representative action under former Business and Professions Code section 17204 was not a codification of prior common law rights.

Prop. 64 expressly repealed the language in former section 17204 authorizing representative actions brought on behalf of the general public. (§ 17204, as amended by Prop. 64.) Further, Prop. 64 expressly provided that "representative claims" may be brought only as class actions. (§§ 17203, 17535, as amended by Prop. 64.) Therefore, Prop. 64 works to repeal the right of a plaintiff to bring a representative action pursuant

to the UCL and the False Advertising Law without complying with the class certification requirements of section 382. Accordingly, we conclude that the amendments to Business and Professions Code sections 17203, 17204, and 17535 contained in Prop. 64 pertaining to class action certification requirements apply to pending cases. (*Bivens*, slip. op. at pp. 12-13.)[13]

3. *The effect of Prop. 64 in this case*

a. *Prop. 64 requires that we direct the trial court to grant judgment on the pleadings with respect to Lytwyn's third, fourth, and fifth causes of action, in favor of Frys*

In both Lytwyn's third and fourth causes of action, he alleges a violation of the False Advertising Law. (Bus. & Prof. Code, §§ 17500, 17531.) Lytwyn's fifth cause of

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13 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 before the effective date of the new law. For reasons more fully explained in *Bivens*, we decline to follow *Californians For Disability Rights* on this issue. Our disagreement with *Californians For Disability Rights* stems from that court's reliance on the California Supreme Court's decision in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 (*Evangelatos*) to conclude that the statutory repeal doctrine does not apply to this issue. (*Californians For Disability Rights, supra,* ___Cal.App.4th at p. ___ [WL 230019, *4], citing *Evangelatos*, *supra*, 44 Cal.3d at pp. 1222-1224.) In our view, *Evangelatos* is inapposite to the question whether Prop. 64 applies 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, a distinction that is material for the reasons described above.

We also note that courts in two recent cases have concluded that Prop. 64 applies to pending cases on essentially the same grounds we have enunciated. (*Benson v. Kwikset Corp.* (Feb. 10, 2005, G030956) ___Cal.App.4th ___ [2005 WL 327472] (*Benson*); *Branick v. Downey Savings and Loan Ass'n* (Feb. 9, 2005, B172981) ___Cal.App.4th ___ [2005 WL 299926] (*Branick*).) The courts in both *Benson* and *Branick* also disagree with the analysis of the issue in *Californians for Disability Rights*.

action states a claim under the UCL. (Bus. & Prof Code, § 17200.) Lytwyn seeks relief on behalf of the "general public" with respect to each of these causes of action. Lytwyn acknowledges that his complaint does not adequately allege facts sufficient to state a class action under section 382.

In light of our conclusion that the amendments to Business and Professions Code sections 17203, 17204, and 17535 contained in Prop. 64 apply to pending cases, it is clear that Lytwyn may no longer pursue the representative actions alleged in his third, fourth, and fifth causes of action.[14] Under such circumstances, it is proper for the trial court to grant judgment on the pleadings with respect to these causes of action. (See § 438, subd. (c)(3) [providing that trial court may grant a "motion for judgment on the pleadings," where "[t]he complaint does not state facts sufficient to constitute a cause of action against that defendant"].) Therefore, we direct the trial court to grant judgment on the pleadings in favor of Fry's with respect to Lytwyn's third, fourth, and fifth causes of actions.

b. *Lytwyn may amend his complaint to attempt to meet the requirements of Prop. 64*

It is well established that: "In the case of . . . a motion for judgment on the pleadings, leave to amend should be granted if there is any reasonable possibility that the plaintiff can state a good cause of action. [Citation.] Where a . . . motion for judgment

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(*Benson*, *supra*, Cal.App.4th at p. ___ [2005 WL 327472, *9]; *Branick*, *supra*, Cal.App.4th at p. ___ [2005 WL 299926, *6].)

14 Lytwyn acknowledges as much in his opening supplemental brief.

on the pleadings is granted as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment." (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.)

There is a reasonable probability that Lytwyn may be able to state valid causes of action against Fry's with respect to his third, fourth, and fifth causes of action. First, Lytwyn may attempt to seek class certification with respect to some or all of these claims. Second, Lytwyn includes himself among the members of the general public for whom restitution and disgorgement is sought with regard to all of his claims; there is therefore a reasonable probability that Lytwyn may be able to adequately allege individual claims with respect to his third, fourth, and fifth causes of action. Accordingly, we direct the trial court to grant Lytwyn leave to amend his complaint with respect to his third, fourth, and fifth causes of action.

IV.

CONCLUSION

The trial court's April 4, 2003 ruling granting Fry's motion for reconsideration of the court's November 22, 2002 order and the court's May 22, 2003 order granting a preliminary injunction are reviewable in this appeal. The trial court did not err in granting Fry's motion to reconsider its November 22, 2002 order.

The trial court did err in granting Fry's motion for a preliminary injunction. The court was not authorized to enjoin this action on the ground that Lytwyn was in privity with Apex pursuant to the rule of exclusive concurrent jurisdiction. In addition, the court

was not authorized to enjoin this action in order to protect Fry's from vexatious litigation or to prevent the impairment of the judgment in the *Apex* case. Finally, the trial court was not empowered to stay this action pursuant to its inherent authority to exercise control over its own proceedings.

Prop. 64 applies to cases that were pending at the time of the effective date of the new law, and requires that we direct the trial court to grant judgment on the pleadings in favor of Fry's with respect to Lytwyn's third, fourth, and fifth causes of action. The trial court is directed to grant Lytwyn leave to amend his complaint with respect to these claims.

V.

DISPOSITION

The May 22, 2003 order granting a preliminary injunction enjoining Lytwyn from prosecuting this action is reversed. The trial court is directed to grant judgment on the pleadings in favor of Fry's on the third, fourth, and fifth causes of action in Lytwyn's complaint, and to allow Lytwyn leave to amend his complaint with respect to the third, fourth, and fifth causes of action.

Each party is to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.