D042401

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

RICHARD LYTWYN,

Plaintiff and Appellant,

vs.

FRY'S ELECTRONICS, INC., et al.

Defendants and Respondents

Appeal from the Superior Court of the State of California,
County of San Diego
Sheridan L. Reed, Judge (Case No. GIC 787977)

APPELLANT'S OPENING BRIEF

Unfair Competition Case
(Bus. & Prof. Code § 17209, and California Rules of Court, Rule 15(e)(2).)

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INTRODUCTION

This appeal arises from an order entered by the San Diego Superior Court enjoining the plaintiff-appellant Richard Lytwyn ("Lytwyn") from prosecuting his lawsuit against defendants-respondents Fry's Electronics, Inc. ("Fry's"), its Vice-President, William Randolph Fry, and its Vice-President, Kathryn Kolder. By his suit against the defendants, he seeks to recover actual and punitive damages, and attorneys fees, for his own injuries, and restitution, injunctive relief for himself and on behalf of the general public.

Lytwyn provided testimony in an unrelated case about what the defendants-appellants did to him. By virtue of the trial court's ruling appealed here, because he was a witness in the other case and is represented by an attorney who participated in the other case, Lytwyn cannot prosecute his own case to recover for his own injuries or for those injuries suffered by other members of the general public.

SUMMARY OF THE CASE

Lytwyn is a 78 year old, disabled resident of San Diego County, California. This lawsuit arose after Lytwyn responded to a Fry's Electronics Inc. advertisement in the San Diego Union Tribune. Lytwyn purchased several pieces of merchandise from Fry's that were not sold

according to the terms of the advertisement, i.e., the goods were mis-marked or used.

Lytwyn now sues defendants-respondents Fry's Electronics, Inc. ("Fry's"), William Randolph Fry, and Kathryn Kolder for advertising and selling him used and mislabeled merchandise instead of the merchandise advertised. In his suit, Lytwyn seeks actual and punitive damages, restitution, and injunctive relief. Lytwn claims that the defendants violated their statutory warranty obligations according to the Song-Beverly Consumer Warranty Act, Civil Code section 1790, et seq.; that defendants violated the Consumer Legal Remedies Act, Civil Code section 1750, et seq.; that defendants violated the prohibition against sales of secondhand merchandise as new, Bus. & Prof. Code 17531; that defendants committed False Advertising, Bus. & Prof. Code section 17500; and that the defendants violated the Unfair Competition Law, Bus. & Prof. Code section 17200.

Lytwyn attempted to resolve his complaints prior to initiating any litigation. (AA 361-380.) He first visited the store and attempted to resolve the matter informally. (AA 371.) Fry's offered to replace the used merchandise that it had sold Lytwyn with new merchandise. Because Lytwyn only discovered that the merchandise was used after it had been installed, Lytwyn incurred expense for the installation which was performed

by a computer technician he hired. Lytwyn was originally willing to accept Fry's offer of the new merchandise if they also paid for his installation expenses in the amount of $90. When Fry's refused to pay those costs, Lytwyn exercised his rights as a consumer to take legal measures. According to the requirements of the Consumer Legal Remedies Act, Civil Code section 1782, he wrote Fry's Electronics, Inc. and described what he experienced at the Fry's store. Within his letter Lytwyn only asked for Fry's to refund him the cost of the used merchandise, and pay the installation charges he incurred as a result of his purchase of the merchandise and replacement. (AA 370-371.) Lytwyn warned Fry's in his letter that he'd bring legal action against the company if they failed to meet his demand. But, because Fry's apparently believes that it is commercially reasonable to sell used merchandise as new, Fry's manager refused.

On November 17, 1999, Lytwyn wrote the County of San Diego Department of Agriculture, Weights and Measures describing the conduct he witnessed. (AA 377-379.).

On May 10, 2000, Lytwyn provided a declaration in a separate lawsuit brought by Fry's competitor Apex Wholesale Inc., ("Apex"). The preceding September of 1999, Apex had sued Fry's for violations of the Unfair Practices Act, alleging sales below cost and price discrimination, and asserted claims for false advertising, unfair competition, and interference

with Apex's prospective economic advantage. (AA 138-156.) By the terms of the operative complaint, Apex sought injunctive relief and restitution for itself and on behalf of the general public, but it only sought actual, punitive and treble damages on its own behalf.

On June 21, 2001, Lytwyn appeared according to a subpoena commanding him to do so and testified in the trial brought by Apex against Fry's. The competitor Apex lost its case, which was tried in the San Diego Superior Court before the Hon. Kevin A. Enright, Superior Court Judge. Fry's prevailed against Apex on all counts, save an advertising violation. The verdict was rendered against Apex in July of 2001. The initial statement of decision, also in Fry's favor against Apex was issued on October 4, 2001. On September 9, 2002, Judge Enright issued the final statement of decision in the Apex Case. On September 13, 2002, the Apex trial court entered the judgment. Those matters are on appeal before this court. (See, e.g., 4th Dist. Ct. Of Appeal, Case No. D041174.)

Prior to entry of the judgment in the Apex Case, Lytwyn filed his complaint in the San Diego Superior Court against the defendants-respondents. Fry's made four separate procedural attempts to derail Lytwyn's litigation against Fry's by moving to re-assign the case to the department of Judge Enright, to stay the proceeding, and to enjoin the proceeding.

The trial court, the Hon. Sheridan L. Reed, presiding, stayed Lytwyn's case because Fry's defeated the other action brought on behalf of the general public by Apex. The trial court ruled that Lytwyn's present action for actual and punitive damages, and equitable relief is enjoined from prosecution because it is a "rehash of parts of the Apex matter." (AA 982.)

PROCEDURAL HISTORY

Defendants published the advertising that Lytwy responded to on August 6, 1999. Lytwyn purchased the subject merchandise on August 9, 1999.

1. Lytwyn provides Notice according to the Consumer Legal Remedies Act.

On October 23, 1999, Lytwyn provided the notice required by the Consumer Legal Remedies Act, Civil Code section 1982, by mailing a certified letter, return receipt requested, to Fry's San Diego store describing Fry's conduct that needed correction. (AA 362.) Within his letter, Lytwyn described Fry's false advertising, the company's misrepresentation of the two products, i.e., the CD Rom writer and the scanner on two separate occasions. He requested that he be reimbursed a total of $90 for the installation charges he incurred as a result of purchasing two used pieces of

merchandise from Fry's. (AA 370-371.) Lytwyn's letter was returned rejected on October 27, 1999. On October 31, 1999, Lytwyn went to the Fry's store in San Diego and hand delivered the letter to Fry's San Diego store manager, David Bicknell. (AA 363.)

2. Lytwyn testifies as a witness in Apex Wholesale, Inc. v. Fry's Electronics, Inc.

On June 21, 2001, Lytwyn appeared at the trial in the matter entitled *Apex Wholesale Inc. v. Fry's Electronics, Inc.*, San Diego Superior Court case no. GIC 734991 (the Apex Case). Lytwyn testified about his experiences with Fry's that gave rise to his letter of October 23, 1999. (AA 382-391; 402-411.)

3. Lytwyn files suit for his own injuries.

On May 6, 2002, Lytwyn, acting for himself and on behalf of members of the general public, filed his complaint in this action alleging that defendants-respondents committed Unfair Competition according to Bus. & Prof. Code section 17200, False Advertising according to Bus. & Prof. Code section 17500, sold secondhand merchandise in violation of Bus. & Prof. Code section 17531, and violated the Song-Beverly Consumer Warranty Act, Civil Code section 1790 et seq., and violated the Consumer Legal Remedies Act, Civil Code section 1750, et seq. (AA 1:103-114.)

4. Fry's files a notice of related case seeking assignment to Judge Enright.

On May 29, 2002, defendants-respondents filed a "notice of related case" and requested that the case be reassigned to the department of the Hon. Kevin A. Enright, Superior Court Judge, who had presided over the Apex Case. On June 10, 2002, plaintiff submitted opposition to the "notice of related case" and opposed any transfer to Judge Enright's department. (AA 123-186.) On June 13, 2002, the defendants replied to the opposition submitted by plaintiff. (AA 187-196.)

5. First Motion: Fry's files an ex-parte application with Judge Reed to stay the proceeding in her department.

On June 12, 2002, defendants-respondents moved the trial court by ex-parte application for an order staying Lytwyn's prosecution of his case, and requested that the case be assigned from Judge Reed to Judge Enright. (AA 986-1068.) The defendants-respondents claimed that because Lytwyn was represented by the same persons who prosecuted the Apex Case, Lytwyn's litigation was barred. (*Id.*) Lytwyn opposed the stay and any transfer. Judge Reed denied the application to stay the proceedings.

6. Second Motion: Fry's files a noticed motion to stay the proceedings.

Notwithstanding that setback, on June 28, 2002, defendants-respondents moved to stay the action pending the resolution of the *Apex Wholesale Inc. v. Fry's Electronics, Inc.* litigation. (AA 197-214.) The legal argument behind defendants motion was that Lytwyn's claims were presented to Judge Enright by Apex. Because Lytwyn had been a witness at the trial, and was presently represented by an attorney for Apex, that his claims were barred by the doctrine of issue preclusion. (AA 205-208.) Defendants further argued that once the claims in Apex were final, by way of a judgment, Lytwyn would be precluded by res judicata. (*Id.*) Fry's also contended that the Court should exercise its inherent equitable power to enjoin Lytwyn from prosecuting his case because any other result would risk an "unseemly conflict" between Courts. (AA 212.)

Lytwyn opposed the motion by setting forth evidence that he had no proprietary interest in Apex Wholesale, Inc., or any of its privies, and that he'd appeared to testify in the Apex Case only as a witness complying with a subpoena. (AA 215-216.) Counsel for Lytwyn also provided by declaration testimony that Lytwyn did not have any control over the proceedings in the Apex Case, and that the identical issues were not litigated because in the Apex Case the plaintiff attempted to raise the

statutory violations associated with the sale of used goods as new, but that Fry's successfully opposed the motion to amend the complaint. (AA 217-219.) Along with that declaration, Lytwyn submitted copies of the record in the Apex Case that demonstrated those efforts. (AA 220 - 283.) Those records included the minute order denying the motion to amend the complaint to advance the claim brought under Bus. & Prof. Code section 17531 made in the Apex Case. (AA 275-276.) On July 26, 2002, Judge Reed entered a tentative ruling denying the motion. (AA 684-685.) Defendants requested oral argument, which the court set for August 2, 2002.

During the August 2, 2002, hearing defendants' attorney William Marchant admitted during oral argument the defendants' efforts cannot foreclose Lytwyn from pursuing his personal claims:[1]

> By the Court: ".... Let me look at the relief requested... So as to the first two causes of action, reimbursement of plaintiffs' goods in an amount equal to the purchase price, actual damages in an amount according to proof, you are not making this argument?
>
> By defense counsel: "If [Lytwyn] wants to proceed with just his own claim, that is different than what he is pleading.

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[1] The trial court had the record of this admission before it when it made the ruling preceding this appeal. (See AA 686-706.)

> He is pleading the same broad 17200 general public arguments that were made in the Apex Case which will require, I'm sure, discovery regarding every sale we have made to every person who has bought the product that he has and so on and so forth, the same exact discovery we have been through in the Apex Case. That is what we want to avoid."

(R/T 8/02/02, 8:7-20.)

On August 2, 2002, the trial court denied respondents motion to stay the Lytwyn action in open court. (R/T 8/02/02, 12:11-18; also at AA 699.) Then, the court entered minute order denying the motion. (AA 296.) On August 7, 2002, plaintiff-appellant Lytwyn served notice of the ruling by Express Mail. (AA 295-297.)

7. Third Motion: Fry's submits an ex-parte application in Judge Enright's department to assume jurisdiction over the Lytwyn case in Judge Reed's department.

On August 27, 2002, defendants-respondents appeared ex-parte in the matter entitled *Apex Case*, and requested that Judge Enright assume jurisdiction over the proceedings in *Lytwyn v. Fry's Electronics, Inc., et al.*, San Diego Superior Court case no. GIC 787977. The effort was by no means a typical ex-parte application. (Request for Judicial Notice "RFJN" A-C; 1069-1102.) The hearing was transcribed; the defendants later

submitted the transcript of the proceedings in support of their motion for the stay that is challenged by this appeal. (AA 782-808.) Judge Enright refused the invitation, and denied the ex-parte application, denying the request on September 9, 2002. (RFJN D; AA 810-812.).

On September 9, 2002, the trial court in the Apex Case, entered its statement of decision denying relief to the plaintiff Apex Wholesale Inc. (RFJN E; 1103-1113.)

On September 13, 2002, the trial court in the Apex Case, entered Judgment. (RFJN F; 1114 -1117.) Nothing in the judgment or the statement of decision makes reference to Lytwyn, or any other member of the "general public" besides Apex Wholesale Inc..

8. Fourth Motion: Motion for preliminary injunction, request for stay.

Prior to filing the ex-parte application referred to as the Third Motion, above, on August 23, 2002, the Fry's defendants once again sought relief in Judge Reed's court by filing, yet another, "Motion for preliminary injunction to prohibit conflicting and vexatious litigation." (AA 298 - 316.) As is apparent from the record, the arguments submitted in support of the motion are the same arguments that were set out in the three prior motions brought by defendants, i.e., Lytwyn's claim was barred by res judicata, and

that the doctrine of exclusive concurrent jurisdiction mandated that Judge Enright seize control of the determination of the Lytwyn action. Once again Lytwyn opposed the motion with substantive argument on the merits. Also, Plaintiff objected to the hearing on the motion based on defendants' failure to comply with CCP § 1008, and after providing a safe harbor notice moved for sanctions according to CCP § 128.7 against defendants for bringing a belated motion for reconsideration.

On November 1, 2002, the trial court issued its ruling denying Fry's fourth motion to stay the proceedings and plaintiff's motion for sanctions. (AA 318-319). The Court ruled, in pertinent part, as follows:

> I have read and considered defendants' motion for a preliminary injunction and plaintiff's motion for sanctions as well as the opposition and reply papers thereto.
>
> Addressing concerns raised by plaintiffs in opposition to the preliminary injunction motion, I decline to issue specific rulings but note that I did not consider any arguments or authority that was raised for the first time in reply.
>
> Requests for judicial notice filed by counsel for Richard Lytwyn in the sanctions motion are granted.
>
> At oral argument for the stay ruling on August 2, 2002, this court opined that it thought Judge Enright was the judge who should decide the issue of exclusive concurrent jurisdiction because Judge Enright was the first" judge to hear this matter. The court's discussion from the August 2, 2002 oral argument is actually referenced in defendant's moving papers at page 2, lines 3-18) On August 27, 2002, Judge Enright heard the exclusive concurrent jurisdiction argument, denied the request

ex-parte hearing and decided not to order an injunction.

Fry's argues in its moving papers for preliminary injunction that the first judge in cases where exclusive concurrent jurisdiction issues comes up must be the judge to hear the issue. (See admissions in Fry's moving papers at page 2, line 5 through page 3, line 12) Here, that issue was heard by the first" judge, Judge Enright, and Judge Enright declined to set a preliminary injunction hearing. He found that an injunction would not be warranted under the facts before him. Because I am not the first judge in this line of cases that are the subject of the exclusive concurrent jurisdiction" issue, I decline to order a preliminary injunction in this case. I see no reason to disturb Judge Enright's decision on this matter.

Plaintiff's motion for sanctions under Code Civ. Proc. §128.7 is denied. A copy of the transcript from the August 2, 2002 oral argument is attached to defendants opposition papers as exhibit C." At page 12, lines 11-18, the court denied the motion for stay without prejudice and then reset the matter after requesting further briefing on issues specific to the preliminary injunction and whether there can be collateral estoppel in a case brought under B&P §17200 et seq. Later in those proceedings, when counsel for Fry's opined that the injunction motion should be brought before Judge Enright, the court stated that defense counsel could bring the motion in this court but that the choice was his (Mr. Marchant's). (See transcript, page 15, line 26 through page 16, line 12) That is exactly what defense counsel did.

The current motion for preliminary injunction is not a motion for reconsideration of the earlier motion for stay. Rather, it is a filing of a motion for preliminary injunction, by defense counsel, after discussion regarding preliminary injunction procedure in open court. Again, the matter was rescheduled to be heard at the August 2, 2002 hearing. As stated in the ruling on the preliminary injunction, Judge Enright heard these issues ex parte on August 27 and this motion was filed August 23,2002, prior to Judge Enright's decision on August 27. Although Judge Enright denied the ex-parte request to set the preliminary injunction motion, defendants were justified in

> bringing the preliminary injunction motion in this department because I suggested that they could do so. These facts do not support the imposition of sanctions against defendants in this case.
>
> * * *

(AA 318-319.)

Plaintiff served notice of the November 1, 2002 ruling denying the Second Motion the same day by Express Mail. That notice of ruling was filed in the trial court on November 5, 2002. (AA 317-320.) Defendants-respondents sought oral argument of the ruling, and were heard on November 22, 2002. The Court affirmed its ruling entered on November 1, 2002. (AA 321-322.)

On December 9, 2002, on plaintiff's ex-parte application, the trial court ordered defendants' to respond to the complaint. (AA 328-329.) On December 20, 2002, defendants responded to the complaint by filing an answer by general denial. (AA 330-337.)

Immediately after defendants filed their answer, Lytwyn moved for summary adjudication. In support of the motion for summary adjudication, Lytwyn relied upon portions of the trial transcript of the testimony offered in the Apex Case.[2]

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[2] Plaintiff's motion for summary adjudication was not included in the record because the ruling on the motion for summary adjudication is not being challenged at this juncture, and because there were no specific evidentiary citations in the

9. Fifth Motion: Motion for reconsideration of prior motion for preliminary injunction, request for stay.

On February 7, 2003, defendants filed their Fifth Motion to enjoin Lytwyn's prosecution of his claims against defendants-respondents. (AA 845-847.) Without specifying the specific evidence, by attaching copies or making request for judicial notice, the defendants asserted that the claim was barred because the plaintiff was relying upon the exact same evidence admitted at the trial of the Apex Case:

> "... and which was relied upon by the plaintiff in the Apex Case ... in support of Apex's claim, brought on behalf of the general public, that Fry's sold used goods as new in violation of Business and Professions Code § 17531, i.e., the exact same Section 17531 Claim that is now asserted by Mr. Lytwyn in this case. In addition, Mr. Lytwyn's attorney, Scott McMillan is the same attorney who prosecuted the Section 17531 claim in the Apex Case, and he is an owner of Apex."

(AA 846-847.)

Lytwyn opposed the motion on the basis that it was an untimely motion for reconsideration (AA 890-891), that Lytwyn's rights were not

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motion for preliminary injunction to the material offered in support of plaintiff's motion for summary adjudication. Rule of Court 323 requires that the a party requesting judicial notice of material under Evidence Code section 452 or 453 "shall provide the court and each party with a copy of the material. If the material is part of the a file in the court in which the matter is being heard, the party shall (1) specify in writing the part of the court file sought to be judicially noticed; and (2) make arrangements with the clerk to have the file in the courtroom at the time of the hearing." (Cal Rul. Of Ct. 323(b).) No such specification was provided by defendants.

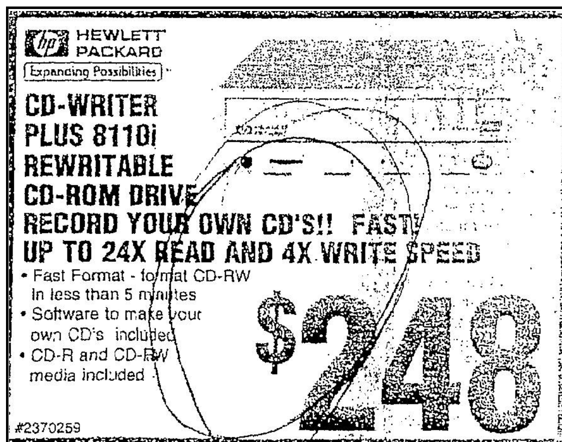
fully and fairly litigated in the Apex Case (AA 892-897), that the application of res judicata would violate Lytwyn's right to due process guaranteed by the United States Constitution (AA 897), that the court could not preclude Lytwyn's litigation of the case by applying the doctrine of Exclusive Concurrent Jurisdiction (AA 898), and that any suggestion of "in rem" jurisdiction over Lytwyn's claim was frivolous (AA 898.)

On May 22, 2003, the trial court, the Hon. Judge Sheridan L. Reed, presiding, granted defendants Fourth Motion for preliminary injunction, a copy of which is attached hereto as Appendix A. (AA 976-977.)

On June 20, 2003, plaintiff noticed the appeal in this action. (AA 975-978.)

STATEMENT OF FACTS

At the time of the incidents that gave rise to this lawsuit Lytwyn was 73 or 74 years old. (AA 361, ¶ 2.) On August 6, 1999, Fry's published an advertisement in the San Diego Union Tribune offering a number of items for retail sale below a banner stating "Back to School Sale." (AA 101 ¶ 8, 112; AA 366.) On August 9, 1999, Lytwyn responded to Fry's offer for a HP CD Writer Plus 8110i, priced at $248, with the assigned stock number of #2370259 as it appears below. (AA 361-362, 366.)

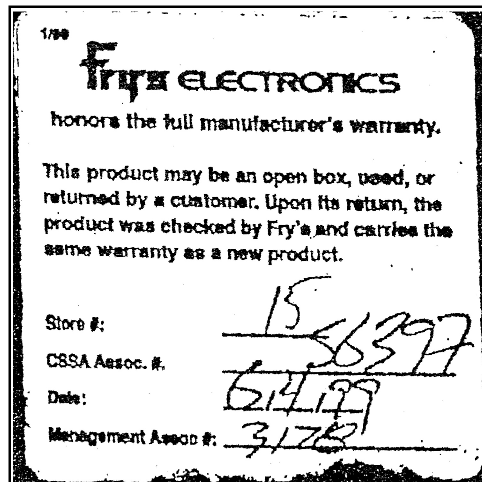


AA 366 - Detail of SDUT 8/06/99

Before traveling to Fry's San Diego location, he first called Fry's "will call" department and placed an order for the drive. Lytwyn then went to the Fry's store located at 9825 Stonecrest Blvd., San Diego, California. He went directly to the will call desk and provided his name and referenced the HP CD Writer he sought to buy. (AA 362, ¶ 5.) The Fry's employee placed the item purporting to be the advertised CD writer in Lytwyn's shopping cart. (AA 362 ¶ 5.) Lytwyn paid for the CD Writer and was assisted to his vehicle with his purchase. (AA 362, ¶¶ 5, 6.) During the transaction, Lytwyn never inspected the merchandise that he bought. (*Id.*)

Lytwyn took the CD Writer to his home and a computer consultant he'd hired installed the CD Writer for him. During the course of the installation Lytwyn discovered that the item he'd purchased was "used" prior to his purchase. (AA 102, ¶ 12; 362, ¶ 7.) The box bore a label, which had been obscured at the time of purchase by another label. (AA 363, ¶ 10.)

The obscured label appears as follows:



AA 368, Exhibit B - Detail Sticker

Lytwyn went to the store and spoke with a manager about the problem with the CD Writer, and who offered to refund the money but refused to pay for the installation charges Lytwyn incurred, and would further incur in changing the CD Writer. (AA 103, ¶ 15; AA 371.)

Contemporaneously with this incident, on August 11, 1999, Fry's entered into an "Assurance of Discontinuance" with the Attorney General for the State of Arizona regarding the defendants' advertising practices. As part of the consent decree, defendants agreed to discontinue the use of the word "sale" in conjunction with offers sold at the regular price. (AA 102, ¶ 9.)

On October 31, 1999, Lytwyn returned to Fry's San Diego Store. He spoke with the store manager, David Bicknell. (AA 104, ¶ 22; AA 362-363, ¶ 10.) Bicknell told Lytwyn it was the customer's responsibility to

verify that the merchandise was new before accepting it. (*Id.*) Lytwyn told Bicknell that the label indicating the secondhand nature of the CD Writer was obscured. (AA 363, ¶ 10.) The CD Writer only works intermittently and has never functioned properly since it was installed in Lytwyn's computer. (AA 388:7-9.)

On May 10, 2000, Lytwyn executed a declaration in conjunction with the Apex Case setting forth his experiences. (AA 361-379.) On June 21, 2001, Lytwyn also appeared and testified at the trial of the Apex Case. (AA 381-411.) The appearance occurred in response to a subpoena. (AA 215-216; 924-926.)

Lytwyn holds no proprietary interest in Apex Wholesale Inc., or any of its assignors, Abacus America, Inc., and Computer Parts Plus, Inc. (*Id.*) Lytwyn had no control over any portion of the other proceedings involving the defendants. (*Id.*) Lytwyn did not intend to relinquish any rights by his participation in the proceedings. (*Id.*) He began his own efforts to correct Fry's conduct and recover for his own injuries before he even learned of the action prosecuted by Apex. (AA 924 - 926.) Lytwyn is not "plaintiff in name only" as he has invested his own time and money in his case and intends to see it resolved at trial. (*Id.*, at ¶ 5.)

On October 12, 2002, Lytwyn visited the Fry's San Diego store and observed that Fry's is still mixing its customer returned merchandise with

new merchandise. (*Id.* ¶ 7.) Lytwyn's health is deteriorating, with cardiac-atrial fibrillation, marginal kidney function, hypertension, and a low heart rate requiring the use of a pacemaker. (*Id.*, at ¶10.)

STATEMENT OF APPELLATE JURISDICTION

The trial court's order of May 22, 2003 constituted an injunction against the prosecution of Lytwyn's claims, both individually and on behalf of the general public. (AA 981 - 982.)

Code of Civil Procedure section 904.1, subd. (a), subp. (6) allows for an appeal to be taken from just such an order as at issue here:

> 904.1. (a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:
>
> * * *
>
> (6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(CCP § 904.1(a)(6.))

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APPELLANT'S OPENING BRIEF

I. THIS COURT MUST CONDUCT AN INDEPENDENT REVIEW OF THE ORDER GRANTING AN INJUNCTION AGAINST THE PROSECUTION OF THIS MATTER.

Generally, the standard of review in determining the propriety of a trial court's ruling on a request for a preliminary injunction is of an "abuse of discretion." This principle is summarized as follows:

> In deciding whether to issue a preliminary injunction, a trial court weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or non-issuance of the injunction. (Citation omitted.) "Generally, the ruling on an application for a preliminary injunction rests in the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal absent a showing that it has been abused." (Citation omitted.) "A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. [Citation.]" (Citation omitted.) The injunction is reviewed under the law in effect at the time the appellate court renders its opinion. (Citation omitted.)

(*Hunt v. Superior Court* (Cal., 1999) 21 Cal. 4th 984, 999)

However, in this case, the trial court's determination as to whether an injunction should issue turned on the interpretation of a legal principle, specifically, that of res judicata or collateral estoppel. Because the trial court's construction of the legal question of claim preclusion was central to

the determination of who would prevail in the action – the trial court's rulings as to matters of law are entitled to *de novo* review by this court:

> 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. (*Bullock v. City and County of San Francisco* (1990) 221 Cal. App. 3d 1072, 1094 [" 'the standard of review [for issues of pure law] is not abuse of discretion but whether statutory or constitutional law was correctly interpreted and applied by the trial court.' "].)

(*People ex rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090, 1136-1137)

The trial court did not properly apply the law relating to res judicata in staying the litigation of the claims of Lytwyn. The trial court based its determination of the identity of the party, the identity of issues, by relying on an extension of privity beyond the named parties in the Apex Case. That determination cannot be squared against either California law applying res judicata or the United States' Constitution guarantee of due process.

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II. THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE OF RES JUDICATA IN DETERMINING THAT PLAINTIFF'S ACTION WAS BARRED UNLESS AN UNRELATED ACTION WAS REVERSED ON APPEAL.

Essentially, Judge Reed's decision holds that the Apex Case, absent reversal of Judge Enright's decision on appeal, bars Lytwyn from recovering from not only his equitable claims under the UCL, the False Advertising Law, and the prohibition against sales of second hand merchandise, but also his legal claims for damages according to the Song Beverly Consumer Warranty Act, and the Consumer Legal Remedies Act. (AA 100-114.) The distinction is significant because the equitable claims did not entitle Lytwyn to a jury trial or to recover damages, while the legal claims do. (*C&K Engineering v. Amber Steel Co.* (1978) 23 C3d 1, 8.)

Assuming, for arguments sake, that the trial in the equitable case did extinguish the rights of the consumer witnesses to bring their own claims, for which they could only recover restitution and injunctive relief. Can the right based on a legal claim, determinable by a jury, also be foreclosed? No.

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A. The Doctrine of Res Judicata

> The doctrine of res judicata rests on 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. Public policy and the interests of litigants alike require that there be an end to litigation. [Citation.] The doctrine applies when 1) the issues decided in the prior adjudication are identical with those presented in the later action; 2) there was a final judgment on the merits in the prior action; and 3) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication. [Citation.] Even if these threshold requirements are established, res judicata will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.]' [Citation.]"

(*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065 ("*COAST*")

B. Res Judicata does not bar Lytwyn's case because there were no Identity of Issues between the Apex Case and Lytwyn's complaint.

To determine if a first judgment will bar the raising of issues in a second suit, the courts will apply the identity of issues requirement. "We must compare the two actions, looking at the rights which are sought to be vindicated and the harm for which redress is claimed. [Citation.]" (*COAST*, *supra*, 60 Cal.App.4th at p. 1067.) This analysis looks to the pleadings and proof in each case. (*Ibid*.) "'There is only a single cause of action for the invasion of one primary right,' even if multiple theories of recovery are asserted. [Citations.]" (*Ibid*.) In the

Apex Case, the plaintiff was seeking compensation for the competitive injury resulting from defendants sales below costs, false advertising, and other commercial misconduct. (AA 341-359.) Apex sued Fry's for violating the Unfair Practices Act, Bus. & Prof. Code section 17000, False Advertising, Bus. & Prof. Code § 17500, and Unfair Competition, Bus. & Prof. Code section 17200, and for interference with prospective economic advantage. (*Id.*)

A judgment in one action will not preclude maintenance of a second action unless the issues or causes of action are identical. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954, disapproved on other grounds in *White v. Vitramar, Inc*. (1999) 21 Cal.4th 563,574, fn. 4.) In ascertaining whether issues and causes of action are identical, California courts utilize the "primary rights" theory. Under this approach, "there is only a single cause of action for the invasion of one primary right." (*Ibid*.) However, despite this seemingly all-encompassing approach, it is recognized that "the bar of res judicata does not apply where '[t]he plaintiff was unable to rely on a certain theory of the case or to <u>seek a certain remedy or form of relief</u> in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.' [Citation.]" *(Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327,

344.) This is precisely the situation in the case at bench because the only relief that Lytwyn could have received by a victory under the best case scenario in the Apex Case was restitution.

The Supreme Court has recently reaffirmed that requiring a "wrongdoing entity [to] disgorge improperly obtained moneys" serves as a "strong deterrent" and is a proper remedy in an appropriate case of unfair competition. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 134.) However, the Supreme Court further held that a court has no power to order a disgorgement of profits in a representative, non-class action case. (*Id.* at p. 137.) A judge presiding over a class action, on the other hand, is specifically authorized to order a disgorgement of profits by Code of Civil Procedure section 384. (23 Cal.4th at p. 133.)

Assuming the trial court's ruling in this case is reversed, there is nothing preventing plaintiff from seeking class certification and prosecuting this action as a class action. Turning to the case at bench, it is beyond dispute that the prior action, the Apex Case, was a representative action, not a class action. Accordingly, disgorgement of the profits Defendants wrongfully made on account of their unfair practices could not, as a matter of law, be obtained in the prior action. (*Id.* at p. 137.) Therefore, the prior action cannot serve as res judicata to preclude Plaintiffs from maintaining a class action to recover, inter alia, a disgorgement of Defendants' profits. (*Branson v. Sun-Diamond*

Growers, *supra*, 24 Cal.App.4th at p. 344.)

Beyond the equitable relief available according to Bus. & Prof. Code sections 17204, and 17535, Lytywn was entitled to claim damages, and attorneys fees, for Fry's breach of its obligations under the Song Beverly Consumer Warranty Act, Civ. Code § 1790, et seq. (See, e.g., Civ. Code § 1794.) And, according to his claims under the Consumer Legal Remedies Act, Civ. Code § 1750, et seq., beyond restitution and injunctive relief, he was also entitled to collect actual and punitive damages, and attorneys fees. (Civ. Code § 1780.) There was no identity of issues between the Apex Case and the case before this court.

C. Res Judicata does not apply because there was no Final Judgment on the Merits in the Apex Case.

Defendants-respondents will readily admit in their motion that there is no final judgment in the Apex Case. It is on appeal before this court. (See, 4th Dist. Ct. Of Appeal No. D041383.) For purposes of collateral estoppel, a "final judgment" is defined as one that is "free from direct attack." (*People v. Sims* (1982) 32 Cal.3d 468, 486.) Stated differently, "[t]o be 'final' for purposes of collateral estoppel the decision need only be immune, as a practical matter, to reversal or amendment." (*Mueller v. J. C. Penney Co.* (1985) 173 Cal. App. 3d 713, 719.)

Necessarily, by granting the relief defendants sought — the trial court presumed that this Court would uphold Judge Enright's decision in the Apex Case. Predicting the outcome of an appeal is not an inquiry that a trial court should be found to be competent to make.

D. Res Judicata did not apply in Lytwyn's action because there is no Identity of parties / Privity with the parties in the Apex Case.

It is undisputed that Richard Lytwyn's name does not appear in the operative pleadings in the Apex Case (AA 341-359), the Statement of Decision (RFJN E), or the Judgment (RFJN F.) By implication in her order, Defendants-respondents convinced the trial that Lytwyn was in privity with the plaintiff in the Apex Case. "The concept of privity for the purposes of res judicata or collateral estoppel 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.]'" (*COAST*, *supra*, 60 Cal.App.4th 1053, 1069-1070.)

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1. Under even an expansive view of "privity," there is no authority supporting the trial court's decision to make a finding that Lytwyn was in privity with Apex.

It is undisputed that Lytwyn testified in the Apex Case regarding the experience with Fry's that gave rise to this lawsuit. But, that fact without more, cannot compel a finding of privity for the purpose of res judicata. (*Lynch v. Glass* (1975) 44 CA3d 943, 950; *Minton v. Caveney* (1961) 56 Cal. 2d 576, 581. (Witnesses are not bound by an adverse judgment unless they controlled the litigation).) Nor did Fry's submit any evidence that a class was certified of similarly situated individuals and a court entered an order from that such a class action that determined Lytywn's rights.[3] Nor did Fry's submit any evidence, or point to any legal authority indicating that only one litigant may present and pursue recovery for a claim such as that held by Lytwyn.

In their arguments that convinced the trial court to afford the relief they sought, defendants relied heavily on the *COAST* decision, *supra*, and on the case of *Rynsburger v. Dairyman's Fertilizer Corp., Inc.* (1968)266 CA2d 269, 279.

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[3] Indeed, the risk of repeated lawsuits against the same defendant based on the same or similar conduct was recognized and commented on by other appellate courts. (See, e.g., *Wilner v. Sunset Life Ins. Co.* (2000) 78 CA4th 952, 970 ("... To be sure, if this matter ultimately does not proceed as a class action, the possibility that nonparties may pursue their own remedies poses as risk to [defendant.]").)

In *COAST*, the public's right to access a strip of beach was litigated by the owners, the California Attorney General, the California *COAST*al Commission, and the State Lands Commission. The plaintiff-appellant in *COAST* unsuccessfully attempted to intervene during the initial litigation consisting of a federal lawsuit and a state lawsuit to quiet title. After the Attorney General and the two other government agencies, and some of the property owners settled the suit, the plaintiff in *COAST* brought a separate action. A demurrer was sustained against the plaintiff on the basis that the new suit was barred by the doctrine of res judicata. The Court held that appellant *COAST* was "adequately represented by the state agencies vested with authority to litigate the issue of public access to the Bolinas Sandspit. A party is adequately represented for purposes of the privity rule 'if his or her interests are so similar to a party's interest that the latter was the former's virtual representative in the earlier action.'" (*COAST*, *supra*., 60 CA4th 1053, at 1070.) In *COAST*, the court identified the actual statutory authority which designated the Attorney General, the California *COAST*al Commission, and the State Lands Commission as the agencies responsible for representing the public interest over access to the disputed real property. (*COAST*, *supra*., 60 CA4th 1053, at 1071.) In the Apex Case, there was no participation by any representative designated by law to represent Lytwyn. The circumstances in *COAST* were significantly distinguishable from these.

Defendants also cited *Rynsburger v. Dairyman's Fertilizer Corp., Inc.*, *supra*, 266 CA2d 269, for their argument that the rule of virtual representation barred Lytwyn from recovering on his claim that Fry's sold him a used CD Writer. *Rynsburger* involved a private nuisance action that followed on the heels of an unsuccessful public nuisance action prosecuted by a *public prosecutor* acting in the name of the *People of the State of California*. In Rynsburger, a group of city attorneys acting on behalf of their municipalities brought public nuisance actions, which were consolidated in the San Bernadino County Superior Court for trial. The *Rynsburger* defendant fertilizer plant proved that its operation were necessary for the health purposes, and that any harm to appellants was outweighed by the sanitary utility to the community. (*See*, *Id.*, at 273.) Also, the *Rynsburger* defendant proved that a safe harbor existed by way of the defendant's compliance with a special use permit issued by the governing municipality. (*Id.*) Thus, the *Rynsburger* defendant proved an affirmative defense of justification or necessity.

These defendants' can't cite to such a record as the defendant in *Rynsburger*. There was no finding of an affirmative defense. There was simply a failure of proof. Even assuming for arguments sake that the other elements of collateral estoppel were established, which they aren't, Judge Enright's decision settled nothing factually vis-a-vis Lytwyn. Judge Enright only decided that competitor Apex Wholesale didn't deserve injunctive relief to

prevent defendants' future "aberrational" conduct. (See, RFJN E; pg. 1111.) The record presented demonstrates that Judge Enright only determined that Apex's proof was inadequate to establish its claims. Moreover, as discussed post, recent appellate courts have refused to extend the concept of privity to bar litigation by private citizens after a law enforcement agency has brought an action. (See, e.g., *Payne v. National Collection Sys.,* (2001) 91 Cal. App. 4th 1037, 1040, 1044, discussed *post*.)

2. Whether an action is brought on behalf of the general public does not evidence an identity of parties or privity for the purpose of res judicata.

Lytwyn sues not only for his own injuries, but to obtain injunctive relief and restitution on behalf of the general public. Apex Wholesale Inc. did the same in the Apex Case. But, this does not create an identity of parties or privity between the two. As to such representative actions, liberal rules of standing and privity have been applied in the UCL context in favor of the plaintiffs. "The courts have consistently upheld the rights of individuals and organizations to sue on behalf of the general public. [Citations.]" (11 Witkin, Summary of Cal. Law (9th ed. 1990 & 2002 Supp.) Equity, § 95A, p. 452.)

As the Supreme Court explained in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 42, "The [unfair competition law] permits

'any person acting for the interests of . . . the general public' (§ 17204) to initiate an action for restitutionary and/or injunctive relief (§ 17203)) against a person or business entity who has engaged in 'any unlawful, unfair or fraudulent business act or practice [or] unfair, deceptive, untrue or misleading advertising [or] any act prohibited by Chapter 1 (commencing with Section 17500 [false advertising]) . . . .' (§ 17200.)" A private plaintiff may prosecute an unfair competition law action on behalf of the general public even when he or she has not personally suffered damages. (*Id.* at pp. 42-43; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561; *Hernandez v. Atlantic Finance Co.* (1980) 105 Cal. App. 3d 65, 70-73.)

The California Supreme Court described the role of the plaintiff who files a complaint pursuant to section 17204 on behalf of the general public as follows: "Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition. These actions supplement the efforts of law enforcement and regulatory agencies. California courts have repeatedly recognized the importance of these private enforcement efforts. (See *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 883; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807-808; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 715.)" (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126.)

California's legislative enactments, and the decisions interpreting those make it clear that when a person acts "on behalf of the general public" in bringing the suit, the general public is not bound by the decision, rather the plaintiff in such a suit is providing notice to the defendant that broad relief is being sought.

3. Even if a law enforcement agency had brought suit against the defendants, instead of a private corporation as in the Apex Case, there would not be an identity of parties, or privity, between the prior plaintiff and Lytwyn.

In *Pacific Land Research Company*, the California attorney general and the Kern County district attorney brought suit on the People's behalf, alleging that the defendant vendors violated section 17200 and section 17500 of the Business and Professions Code while selling tracts of land to the public. (*People v. Pacific Land Research Co.* (1977) 20 Cal. 3d 10, 14.) In particular, the complaint alleged that the defendants were landowners who solicited purchasers through false and misleading statements and who created subdivisions without following the relevant subdivision provisions of the Business and Professions Code. The complaint sought a temporary restraining order, preliminary and permanent injunctions, a civil penalty, and restitution for the land purchasers. After the trial court ruled in the People's favor on the

preliminary injunction, the defendants appealed, contending that the inclusion of restitution in the complaint meant that the court had to follow class action procedural safeguards. (*Id.*, at 15.)

The California Supreme Court, however, disagreed with the defendants. The court found that the People's action was "fundamentally a law enforcement action designed to protect the public and not to benefit private parties." (*Id.*, at 17.) After all, injunctive relief was intended to prevent parties from continuing to violate the laws and to prevent violators from dissipating illegally obtained funds; civil penalties were meant to punish violators for past illegal conduct. Any requests for restitution were only ancillary to these public remedies, not the primary objective of the public suit. (*Id.*) The court added that "an action by the People lacks the fundamental attributes of a consumer class action filed by a private party." (*Id.*, at 18.)

Furthermore, if the People were required to follow class action procedures, they might be forced to abandon restitution claims whenever immediate injunctive relief was necessary to protect consumers from further illegal acts by the defendants. The court found this result unacceptable, primarily since a key reason for class action safeguards was to allow defendants to assess the resources that they should spend in defending against this type of litigation. In *Pacific Land Research Company*, since the People

sought a $ 2,500 civil penalty for each of the defendants' alleged violations, the court believed the defendants had "sufficient incentive to mount a vigorous defense...." (*Id.*, at 20.) In addition, the court mused that, if the People failed to prevail in their action, the odds that other parties seeking restitution would harass the defendant through litigation was no more than "a remote theoretical possibility." (*Id.*, citing *Cartt v. Superior Court* (1975) 50 Cal. App. 3d 960, 969.)

Moreover, as the Supreme Court pointed out in *Pacific Land Research Co.*, due process is not satisfied by when a res judicata effect is given to a non-class action representative action. Failure to require notification of the class before a decision on the merits prevents a binding adjudication against the class because members of the class who were not notified are not barred by the determination in the defendant's favor since they were not parties. On the other hand, a defendant who loses an action brought by individual class members may be estopped under the doctrine of collateral estoppel to deny the binding effect of the judgment against him in a subsequent action brought by other class members. (*People v. Pacific Land Research Co.* (1977) 20 Cal. 3d 10, 17.)

Less than two years ago, the court of appeal faced another preclusive effect argument in a UCL action. In *Payne* v. *National Collection Systems*, the Los Angeles district attorney and the California attorney general sued Trans

World Airlines and National Collection Systems in connection with a TWA training course that produced $ 7.5 million in profits for the defendants. (*Payne v. National Collection Sys.,* (2001) 91 Cal. App. 4th 1037, 1040, 1044.) The plaintiffs alleged that TWA did not guarantee jobs to those completing the course (as TWA had originally promised), a majority of the travel industry did not use the reservation system taught during the course, classes were unruly and disorganized, educational materials were rarely used, a majority of the teachers were not accredited, and the fees and expenses for the course were such that successful applicants ultimately earned less than the minimum hourly wage. (*Id.*, at 1041-42.) Two years after filing suit, the district attorney and the attorney general secured separate judgments against the defendants, imposing both injunctive and monetary relief based, in part, on the UCL. The attorney general's judgment even produced restitution for 63 individuals harmed by the defendants' conduct. (*Id.*, at 1039.)

Three months after the judgments were entered, 23 former job applicants brought a UCL class action against the defendants with regard to the same training course. None of the 63 individuals receiving restitution under the prior judgments were plaintiffs in this second action. (*Id.*, at 1039-40.) Nevertheless, the trial court sustained the defendants' demurrer to the UCL cause of action on res judicata grounds, prompting the plaintiffs to appeal. (*Id.*, at 1039.)

Pointedly relying on the *Pacific Land Research Company* decision, the appellate court considered the fundamental differences between public actions and either class actions or other representative litigation. (*Id.*, at 1045.) In particular, the court found that public prosecutors fundamentally bring UCL actions both for the public benefit and for law enforcement purposes. (*Id.*, at 1046.) Private parties, on the other hand, typically bring suit to make whole the victims of improper business practices. (*Id.*, at 1047.) Therefore, since the prior action was brought on the public's behalf while the present action was brought on behalf of private individuals, and since the 23 private plaintiffs in the present action did not receive restitution in the first case, res judicata did not apply. (*Id.*, at 1047-1048.)

In an analogous set of circumstances, in *People ex rel. Orloff v. Pacific Bell*, 2003 Cal. LEXIS 9459, 44-45 (Cal. December 15, 2003), the California Supreme Court overturned an appellate court decision precluding a district attorney from prosecuting a public utility for its fraudulent conduct which was the subject of a separate administrative proceeding. In *Orloff*, several district attorneys commenced an action under section 17200 and 17500 of the Business and Professions Code against Pacific Bell. Their complaint alleged that Pacific Bell and three other defendants had engaged in false advertising and unfair competition, specifically by making false and misleading representations while marketing telecommunication services. Soon after filing the complaint, the

district attorneys filed a motion for a preliminary injunction to prohibit Pacific Bell from continuing to engage in the alleged false advertising and unlawful business practices. Pacific Bell responded to the complaint by filing demurrer, asserting that the Superior Court lacked subject matter jurisdiction because there was a related administrative proceeding pending before the Public Utilities Commission. This argument rings resoundingly similar to the premise advanced by the defendants to the trial court, i.e., that Judge Reed's rulings would interfere with Judge Enright's rulings. The Supreme Court rejected the utility's argument by rendering a decision entered on December 15, 2003, in *People ex rel. Orloff v. Pacific Bell*, ruled that

> "...the Court of Appeal erred in relying solely upon the circumstance that the allegations of the complaint in the present action were the same as the allegations in the PUC proceeding, rather than considering the extent to which the remedies in the two proceedings were likely to be inconsistent and thus were likely to undermine any ongoing authority or regulatory program of the PUC. Enforcement of the vast array of consumer protection laws to which public utilities are subject is a task that would be difficult to accomplish by a single regulatory agency, and the applicable statutes clearly contemplate that other public law enforcement officials, in addition to the PUC, must be involved in the effort to enforce such laws. No actions by the district attorneys in the present case would interfere with the authority of the PUC; on the contrary, the proceedings they have instituted assist the enforcement efforts of the PUC by ensuring that public utilities to the same degree as other types of businesses are subject to liability in actions initiated by public officials."

(*People ex rel. Orloff v. Pacific Bell*, 2003 Cal. LEXIS 9459, 44-45 (Cal.

December 15, 2003)

The overwhelming message from the Supreme Court encompassed by *Pacific Land Research*, *Payne*, and *Orloff* is that a defendant will not find a safe harbor for past misconduct by claiming that another court or tribunal has ruled on the misconduct alleged by the second plaintiff. Not only was Lytwyn not identifiable with Apex Wholesale Inc., but Lytwyn's remedies were different from those available even had Apex prevailed and obtained restitution on behalf of the general public.

4. There was no demonstration that the interests of Lytwyn were adequately represented in the Apex Case to justify holding him in privity with Apex.

In *COAST*, *supra*, the Court of Appeal held that the public interest had been adequately represented in a prior action by state agencies. The state agencies were responsible for representing the public interest in disputes over beach access. (*Id.* at pp. 1070-1071.) The record showed the state agencies "zealously pursued the rights of the public to use the [beach]." (*Id.* at p. 1072.) Further, the state agencies obtained a settlement that was favorable to the public. The *COAST* court concluded: "Thus, the state agencies not only acted on behalf of the public . . . but the representation provided was in all respects effective. [Citations.]" (*Ibid.*) The Court of Appeal concluded that the plaintiff

public interest group was in privity with the parties to the settlement agreement and, under the doctrine of res judicata, had no standing to bring a repetitive suit. (*Id.* at p. 1074.) The court emphasized: "Only because we find that the right of public access to the [beach] was considered, litigated and thoroughly protected do we accord binding effect to the settlement agreement in this proceeding despite [the plaintiff's] lack of direct participation in the prior actions." (*Id.* at pp. 1074-1075, italics added.)

In contrast to *COAST*, in *Victa v. Merle Norman Cosmetics* (Cal. App. , 1993) 19 Cal. App. 4th 454, at pages 467-468, the court of appeal held an employee was not in privity with the Equal Opportunity Employment Commission (EEOC) for res judicata purposes. The EEOC purported to prosecute its action on the employee's behalf. The EEOC also allegedly prosecuted the lawsuit to make the employee whole. The EEOC also purportedly pursued the litigation in the general public interest and to correct past unlawful employment practices. However, the EEOC dispensed with the employee's interest when it settled the case against the employer. The EEOC dismissed the matter in return for the employer's submission to a general injunction. The court of appeal held that "Surely, in obtaining the judgment here urged as res judicata, the EEOC did not act as plaintiff's representative. [Citation.]" (*Id.* at p. 468.) The court of appeal concluded: "In this case the element of privity, representative or otherwise, was lacking, and hence the

judgment in the EEOC case cannot serve as res judicata. This decision . . . derives from the particular facts of the case at hand . . . ." (*Id.* at p. 468.)

Adequacy of representation in a private representative action under the unfair competition law is a concern because of the ease with which a party can assert it represents the general public in an action where the plaintiff also has a substantial financial stake. A further concern is the potential conflict of interest which may lead such a party to sacrifice the interests of the general public in favor of its own. (See Fellmeth, California's Unfair Competition Act: Conundrums and Confusions (Jan. 1995) 26 Cal. Law Revision Com. Rep. (1996) p. 227.) As one commentator has explained: "[The unfair competition law] provides that any person who files is a party allowed to represent the injunctive/restitutionary interests of all who may be injured--historically or prospectively. If the litigation which then ensues bars others who might have been victims and are due restitution, serious due process issues arise. That is, many unfair competition' cases are brought by plaintiffs based on their own narrow dispute with a defendant; their allegations of public injury warranting restitution beyond their individual interest may expand discovery scope and increase leverage--a leverage they may sacrifice for their own gain. . . ." (Fellmeth, Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First, vol. 15 Cal. Reg. L.Rptr. at p. 1; see also Rest.2d Judgments, § 42(1)(e) & com. a [nonparty not bound if representative

failed to faithfully discharge responsibility and adequately represent].)

In this case, there was no evidence presented by the defendants, or even a suggestion that Lytwyn's interests were adequately represented by Apex.

E. Applying Res Judicata to preclude Lytwyn from litigating his claims is against the public policy expressed by California's Legislature.

The California Legislature has made attempts to resolve the preclusion issue, to no avail. For example, in February 2002, Assembyman Robert Pacheco introduced a bill in the state Assembly that, in its amended form, claimed that:

> (d) The unfair competition law is being misused by a significant number of private attorneys as a means of generating attorneys' fees without creating a corresponding public benefit in *certain* situations, including the following:...(3) Filing repetitive claims on behalf of the general public over issues and activities that have already been resolved by a prior claim on behalf of the general public.

((AB 1884 (introduced Feb. 5, 2002, as amended in the state Assembly, May 9, 2002) (emphasis in original); RFJN G).

The bill proposed a new section, *Business and Professions Code Section 17300*, which would allow for private, representative UCL actions if 1) the plaintiff suffered a distinct and palpable injury due to unfair competition, 2) the plaintiff served the defendant with a copy of a notice of intent to sue 90 days

before commencing the action, 3) no public prosecution was initiated against the defendant "alleging substantially similar facts and theories of liability," and 4) no other private, representative action was initiated against the defendant "alleging substantially similar facts and theories of liability." (*Id.*)

But the bill never made it out of the Assembly Committee on Judiciary. (RFJN H.) This was not surprising, for, as the California Supreme Court aptly noted, "Whenever the Legislature has acted to amend the UCL, it has done so only to *expand* its scope, never to narrow it." (*Stop Youth Addiction v. Lucky Stores* (1998) 17 Cal. 4th 553, 570 (emphasis in original). Indeed, by the express pronouncement of the Legislature, all remedies under section 17200 are "cumulative." (Bus. & Prof. Code § 17205.)

It was improper for the trial court to inject its own concept of fairness in Lytwyn's case by unreasonably expanding the notion of privity. Until the Legislature decides that an availment to the protections of the unfair competition law are to be limited to plaintiff's who are bringing the conduct to a court's attention for the first time, the doctrine of res judicata should not be applied to persons in Lytwyn's procedural circumstance.

Besides all the legal arguments, precluding Lytwyn from litigating his claims is manifestly unjust because there has never been any dispute that he was sold something that he didn't intend to buy, i.e., a used CD Writer instead of the new product advertised. What has occurred in this case is because of

persistent aggressive advocacy, this elderly gentleman has not received his day in court. Except for the corporate defendant, nobody before this court will live forever, but Lytwyn is acutely aware of that fact because of his age and his medical problems.

III. THE TRIAL COURT ERRED IN APPLYING THE RULE OF EXCLUSIVE CONCURRENT JURISDICTION TO JUSTIFY THE STAY IN THIS CASE.

The doctrine of exclusive concurrent jurisdiction is stated in *Plant Insulation Co. v. Fibreboard Corp*. (1990) 224 CA3d 781 as:

> Under the rule of exclusive concurrent jurisdiction, "when two superior courts have concurrent *jurisdiction over* ***the subject matter*** *and* ***all parties involved*** in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved."

(*Id*, 786-787.) (Emphasis added.)

Trial court error in determining application of the rule of exclusive concurrent jurisdiction is reversible only where the error results in a miscarriage of justice or prejudice to the party asserting the rule. (*People ex rel. Garamendi v. Am. Autoplan* (Cal. App. , 1993) 20 Cal. App. 4th 760, 772.) Not only did Lytwyn suffer a miscarriage of justice, the decision to apply the rule of exclusive concurrent jurisdiction necessarily relied upon by the trial

court required a determination of a legal issue, i.e., whether Lytwyn was "identified" with the plaintiff in the Apex Case. That determination is subject to de novo review. Moreover, Defendants-respondents never alleged that the Lytwyn was anything but a witness in the Apex case, albeit one with a prospective right of restitution by the prayer in the complaint filed in that action.

Lytwyn was not a party in the Apex Case, and for the reasons described above, he was not "virtually represented" sufficient to impose upon him the status of a party. Thus, the jurisdictional element necessary to impose exclusive concurrent jurisdiction is completely missing. In the trial court, Defendants-Respondents repeatedly cited to *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 CA4th 1168, 1176 for their proposition that exclusive concurrent jurisdiction existed at the trial court. But, what defendants fail to distinguish is that in *Franklin*, the parties that were restrained from litigating the cause were subject to the jurisdiction of the first court. Lytwyn was not a plaintiff or a defendant in Apex.

In re Marriage of Orchard (1990) 224 CA3d 155, 160, also cited by defendants-respondents at the trial court is also inapplicable. That case involved a dissolution of a marriage and the determination of property rights associated with that union. The Orchard court found that the appellant was in privity even though she was not a named party, because a wife is in privity with

her husband in a suit against him involving community real estate.

In sum, the doctrine of exclusive concurrent jurisdiction had no place in the case before this court without an finding of privity. Finally, the fact that Judge Enright had no ability to grant Lytwyn the relief that he seeks in this case, i.e., actual and punitive damages plus attorneys fees, negates any claim of exclusive concurrent jurisdiction. The doctrine of exclusive concurrent jurisdiction simply does not apply where the first court could not grant the relief sought in the second action. (See *Childs* v. *Eltinge* (1973) 29 Cal.App.3d 843, 847-848.)

IV. DUE PROCESS BARRED THE COURT FROM ENJOINING LYTWYN FROM PROSECUTING HIS OWN SUIT FOR HIS DAMAGES.

Lytwyn had a property interest in his chose in action against the Fry's defendants. (Civ. Code §§ 657, 953.) The Due Process clause of United States Constitution protects the determination of the property interest. He had no idea that any of his rights might be foreclosed by the litigation of the Apex Case. (AA 925.) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objection." (*Mullane*

v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950) (citations omitted).) “Some litigants–those who never appeared in a prior action–may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and *arguments* on the claim. Due process prohibits estopping them....” (*Blonder-Tongue Laboratories v. University of Illinois Foundation*, 91 S.Ct. 1434, 1443 (1971)*(Emphasis added*.) Due process concerns are present when the party sought to be precluded was not an actual party in the first lawsuit. Because preclusion based on privity is an exception to the "deep-rooted historic tradition that everyone should have his own day in court," *Richards v. Jefferson County, Ala.*, 135 L. Ed. 2d 76, 116 S. Ct. 1761, 1766 (1996) (citation omitted), courts must ensure that the relationship between the party to the original suit and the party sought to be precluded in the later suit is sufficiently close to justify preclusion. Thus, "the due process clauses prevent preclusion when the relationship between the party and non-party becomes too attenuated." (*Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 95 (5th Cir.), *cert. denied*, 434 U.S. 832, 54 L. Ed. 2d 93, 98 S. Ct. 117 (1977).

Due process concerns are triggered in this case because the “general public,” including Lytwyn, are nonparties to the earlier action, and were not given notice of the proceedings, and have no opportunity to be heard. Moreover, they were not adequately represented. (See, e.g., *Richards v.*

Jefferson County (1996) 517 U.S. 793, 794-802, 135 L. Ed. 2d 76, 116 S. Ct. 1761; *Hansberry v. Lee* (1940) 311 U.S. 32, 40-46, 85 L. Ed. 22, 61 S. Ct. 115; *Kraus v. Trinity Management Services, Inc.*, *supra*, 23 Cal.4th at pp. 125-126, 138-139; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, *supra*, 17 Cal.4th at pp. 582-584 [conc. opn. of Baxter, J.]; Fellmeth, Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First? (1995) vol. 15, No. 1, Cal. Reg. L.Rptr. 1.)

The United States Supreme Court has described the relationship between due process and res judicata as follows:

> "'The doctrine of res judicata rests at bottom 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. [Citations.] The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. [Citations] And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard [citations], so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.' [Citation.]"

(*Richards v. Jefferson County*, *supra*, 517 U.S. at p. 797, fn. 4.)

The fact that Lytwyn had no ability to direct the litigation in the Apex Case, had no ability to vindicate his rights to damages, and had no notice that the determination of the Apex Case would affect him in any way defeats any claim of "notice and opportunity to be heard" necessary to preclude Lytwyn

from litigating his present claim.[4]

And, it is immaterial whether Richard Lytwyn was represented by the same Lawyers as the plaintiff in the Apex Case. Defendants-respondents placed much of their argument on the fact that Scott McMillan represented the plaintiff in the Apex case, as well as Mr. Lytywn. This precise issue, i.e., prior representation by the same lawyers in the initial and also in the successive lawsuit where the res judicata claim is posited, has been resolved by the United States Supreme Court in *South Central Bell Telephone Co. v. Alabama* (1999) 526 U.S. 160, 168, 143 L. Ed. 2d 258, 119 S. Ct. 1180. In *South Central Bell*, the State of Alabama opposed a certiorari petition on the grounds that a judgment in a tax case was entitled to res judicata effect in a subsequent lawsuit brought by a different taxpayer. The state argued that the due process concerns articulated in *Richards v. Jefferson County*, *supra*, 517 U.S. at pages 801-802, were inapplicable because one of the lawyers in the prior tax matter and in the trial court in the *South Central Bell* case were one and the same. The Supreme Court disagreed with the trial judge's efforts to distinguish the res judicata and due process analysis in *Richards* based on the dual representation

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At the trial court, the defendants argued that *Gates v. Superior Court* (1986) 178 CA3d 301 precluded Lytwyn from pursuing his claims in his own action. *Gates* held that a judgment in a representative action brought by a taxpayer were binding on subsequent taxpayers even though the second taxpayer did not participate in the proceedings. This ruling is probably unconstitutional in light of the holding in *Richards v. Jefferson County, Alabama* (1996) 517 U.S. 793.

by the same attorney in the first and second lawsuits as follows:

> "The Alabama trial court tried to distinguish the circumstances before us from those in *Richards* by pointing out that the plaintiffs here were aware of the earlier . . . litigation and that one of the . . . lawyers [in the prior lawsuit] also represented the *Bell* plaintiffs. . . . These circumstances, however, created no special representational relationship between the earlier and later plaintiffs. Nor could these facts have led the later plaintiffs to expect to be precluded, as a matter of res judicata, by the earlier judgment itself, even though they may well have expected that the rule of law announced in [the prior lawsuit] would bind them in the same way that a decided case binds every citizen."

(*South Central Bell Telephone Co. v. Alabama*, *supra*, 526 U.S. at p. 168.)

Given the express analysis in *South Central Bell*, the fact that Mr. Lytwyn's lawyer was intimately involved in the Apex Case as well as this lawsuit does not satisfy the due process concerns established by the United States Supreme Court, which are applicable in the res judicata context.

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V. THE COURT ABUSED ITS DISCRETION BY ISSUING THE INJUNCTION IN THIS ACTION AND BY FAILING TO REQUIRE AN UNDERTAKING.

Code of Civil Procedure § 526 empowers a court to issue an injunction to prevent a multiplicity of judicial proceedings. (CCP § 526(a)(6).)

Subsection (a)(6) is typically applied to prevent a multiplicity of proceedings between the same parties. "There are two general classes of cases in which injunctions are issued to prevent a multiplicity of actions, namely, those in which many claims which have not been adjudicated are brought into equity to be made the subject of a single trial and decree, ... [Cites omitted,] and those that are enjoined because they are shown to be vexatious suits upon causes of action that have been settled by former adjudication." (*Bartholomew v. Bartholomew* (1942) 56 Cal. App. 2d 216, 225.)

From the preceding, it is clear that this case falls into neither category. Lytwyn never had his day in court. And, from the record, it was clear that Lytwyn bears a substantial risk over not making it to his day in court due to his health. The record is devoid of evidence demonstrating that irreparable injury to defendants-appellants from the litigation at the trial court would occur justifying the imposition of the extraordinary remedy of an injunction. The basis for the injunction that defendants relied upon was that the present litigation was rendering a the judgment in the Apex Case "ineffective." (AA

857-859.)

As set forth infra, if Lytwyn has the right to render a judgment ineffective as a result of his own litigation, there is nothing that the Fry's defendants may properly complain of. Indeed, judgments are often rendered "ineffective" by changes in statutory or decisional law. The trial court relied on this naked argument to irreparably damage Lytwyn's case by enjoining its prosecution.

Code of Civil Procedure section 529 requires that on granting an injunction, the court <u>must</u> require an undertaking on the party protected by the injunction to the effect that the person enjoined will be entitled to recover from the moving party any damages that the party may sustain by reason of the injunction. (CCP § 529.) There was nothing in the order requiring the Fry's defendants to post a bond. Clearly, if plaintiff dies during the pendency of this appeal, his case will suffer greatly.

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VI. THE COURT ERRED IN ENTERTAINING FRY'S UNTIMELY MOTION FOR RECONSIDERATION.

Contrary to the order entered May 22, 2003, the Notice Of Ruling of the court's November 1, 2002 determination of the defendants-respondents preceding motion for injunction was not only served that same day, but also filed on November 5, 2002. (AA 317-320.) Subdivision (a) of Code of Civil Procedure section 1008 allows a party to seek reconsideration of an order based on "new or different facts, circumstances, or law." In applying this subdivision, courts have required the moving party to demonstrate not only the grounds for reconsideration, but also a satisfactory explanation for the failure to present earlier the new circumstances, evidence, or law. (*Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (Cal. App. , 2003) 107 Cal. App. 4th 197, 205.)

A review of the memorandum of points and authorities supporting the two successive motions brought by defendant demonstrate that there was no new evidence or law justifying any reconsideration of the order entered November 1, 2002, or any of the other three orders on the same matter. (Compare AA 298 - 316; AA 849-868.) "Section 1008 is designed to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over. On the other hand, these same judicial resources would be wasted if the court could not . . . review and change its interim

rulings." (*Scott Co. v. United States Fidelity & Guaranty Ins. Co.*, *Id.*, at 211). There was no basis for the court to change any of the four preceding interim rulings made regarding this issue. That plaintiff relied upon the same facts that he testified to at trial to support his claim was disclosed in the complaint. The trial court erred by exercising its discretion to reconsider the four prior rulings.

CONCLUSION

Plaintiff-appellant Richard Lytwyn requests that this court reverse the order entered on May 22, 2003, and award him his costs in prosecuting this appeal.

Dated:

Respectfully submitted,

THE MCMILLAN LAW FIRM, APC

____
Scott A. McMillan
Attorney for Plaintiff - Appellant
Richard Lytwyn

CERTIFICATE OF COUNSEL RE WORD LENGTH

I, Scott A. McMillan, hereby certify as follows:

I am appellate counsel for Plaintiff Appellant Richard Lytwyn. According to the word processing program I used to prepare this brief, the brief, excluding tables, this certificate, the certificate of service and any attachments is 12434 words long.

Dated:

____

CERTIFICATE OF SERVICE

I, Scott A. McMillan, declare as follows:

I am over the age of eighteen, employed in the County of San Diego, and not a party to the above captioned action. On December 29, 2003, I caused to be served upon the defendants-appellees FRY'S ELECTRONICS, KATHRYN KOLDER, WILLIAM RANDOLPH FRY, the following document:

- APPELLANT'S OPENING BRIEF
- APPELLANT'S APPENDIX VOL I, II, III, IV.
- REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF APPELLANT'S OPENING BRIEF ON APPEAL.

on behalf of plaintiff-appellant Richard Lytwyn, by U.S. Mail, I placed the documents in a container, addressed as follows:

For Fry's Electronics, Inc., William Randolph Fry, and Kathryn Kolder:

James D. Claytor, Esq.
Foley McIntosh Frey & Claytor
3675 Mt. Diablo Blvd., Suite 250
Lafayette, CA 94549

I affixed the requisite postage, and deposited in the U.S. Mail in a box or other facility maintained by the U.S. Postal Service.

On December 29, 2003, I caused to be served upon the District Attorney for the County of San Diego, and the Attorney General for the State of California, the following documents:

- APPELLANT'S OPENING BRIEF
- REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF APPELLANT'S OPENING BRIEF ON APPEAL.

on behalf of plaintiff Richard Lytwyn, by U.S. Mail, I placed the documents in an envelope, addressed as follows:

Attorney General of the State of California
Attention Consumer Law Section
600 South Spring Street
Los Angeles, CA 90013

San Diego County District Attorney
330 West Broadway
San Diego, CA 92101

I affixed the requisite postage, and deposited in the U.S. Mail in a box or other facility maintained by the U.S. Postal Service.

I declare under the penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this proof of service is executed in the County of San Diego, California, on December 29, 2003.

____

Scott A. McMillan

APPENDIX ‘A’

RULING OF MAY 22, 2003, OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, HON. SHERIDAN L. REED, PRESIDING.