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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| APEX WHOLESALE, INC.,<br>Plaintiff and Appellant,<br>v.<br>FRY'S ELECTRONICS, INC.,<br>Defendant and Appellant. | D041383<br><br>(Super. Ct. No. GIC734991) |

APPEALS from a judgment and APPEAL from postjudgment orders of the Superior Court of San Diego County, Kevin A. Enright, Judge. Judgment reversed in part and affirmed in part; orders affirmed.

Plaintiff Apex Wholesale, Inc. (Apex), a seller of computer equipment, sued defendants Fry's Electronics, Inc. (Fry's), Randy Fry, and David Bicknell for alleged

violations of the Unfair Practices Act (UPA) (Bus. & Prof. Code[1], § 17000 et seq.), false advertising (§ 17500), unfair competition (§ 17200), and intentional and negligent interference with prospective advantage. Randy Fry is a founder, officer, and director of Fry's, and Bicknell was a manager of Fry's San Diego store. A bifurcated trial in which legal issues were tried to a jury and equitable issues were tried to the court resulted in a judgment in favor of defendants on all claims, with the exception that the judgment permanently enjoins Fry's and Randy Fry from advertising the single unit price of goods sold only in multiple units unless the advertisement discloses the multiple unit price at least as prominently as the single unit price, as required by section 17504.

Apex appeals from the judgment, contending: (1) The court committed prejudicial instructional error with respect to Apex's first cause of action for violations of the UPA and fourth cause of action for intentional interference with prospective economic advantage; (2) the court's statement of decision on Apex's equitable claims is prejudicially defective; (3) the judgment as it relates to Apex's claims for competitor unfairness and consumer claims brought on behalf of the general public is not supported by the evidence; and (4) the court erred in granting Bicknell's motion for summary adjudication of the first cause of action. Apex also appeals from postjudgment orders denying its motion for judgment notwithstanding the verdict (JNOV) as to its first cause of action and its motion for "cost of proof" sanctions under former Code of Civil

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

Procedure section 2033, subdivision (o) (regarding requests for admission).[2] Fry's and Randy Fry appeal the portion of the judgment permanently enjoining them from violating section 17504, contending the court misconstrued that statute and there is insufficient evidence the enjoined acts are likely to recur.

We conclude the court committed prejudicial instructional error with respect to Apex's fourth cause of action for intentional interference with prospective economic advantage and, accordingly, reverse the judgment as to that cause of action. We otherwise affirm the judgment and affirm the postjudgment orders challenged by Apex.[3]

FACTUAL AND PROCEDURAL BACKGROUND

Apex is a wholesale and retail seller of computers and computer parts. Apex was incorporated in the late 1980's to act as the "mother ship" of several predecessor business entities, the names of which became fictitious business names of Apex. In 1997 Fry's opened a store in San Diego.

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2 Apex filed nine separate notices of appeal, one from the judgment and the others from various postjudgment orders. We address only the appealed orders that Apex addresses in its opening brief.

3 Fry's asserts in its respondent's brief that statutory changes resulting from Proposition 64, passed in the November 2004 election, apply to this action and bar Apex from obtaining any relief on its claims brought on behalf of the general public under section 17200. We need not address that issue because Apex's section 17200 claims on behalf of the general public fail for other reasons. Even if applied retroactively, Proposition 64 does not compel reversal of the portion of the judgment in favor of Apex on its claim that Fry's violated section 17504, as Apex brought that claim as a direct competitor allegedly injured by Fry's acts of unfair competition (in the form of false advertising) as well as on behalf of the general public.

The question of whether Proposition 64 applies retroactively is now pending before the California Supreme Court. (E.g., *Bivens v. Corel Corp*. (2005) 126

In December 1999 Apex filed a second amended complaint that included causes of action for (1) violations of the UPA; (2) false advertising; (3) unfair competition; and (4) intentional interference with prospective economic advantage.[4] The first cause of action for violations of the UPA alleges that Fry's unlawfully sold items as loss leaders, advertised items for sale at prices below their replacement or invoice cost, and engaged in discriminatory pricing between its San Diego store and other stores throughout California.[5] The second cause of action for false advertising includes allegations that Fry's engaged in "bait and switch" tactics;[6] advertised items at after-rebate prices without adequately disclosing the uncertainty of receiving the rebate or that sales tax would be charged on the full in-store price; misled customers regarding the terms of extended warranties (called "Performance Guarantees") they purchased; and represented that certain merchandise carried a manufacturer's warranty without disclosing that the

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Cal.App.4th 1392, review granted April 27, 2005, S132695; *Lytwyn v. Fry's Electronics, Inc*. (2005) 126 Cal.App.4th 1455, review granted April 27, 2005, S133075.)

4 A fifth cause of action for negligent interference with prospective economic advantage was dismissed before trial.

5 References to "Fry's" in connection to the first, second and third causes of action include Randy Fry. The fourth cause of action was brought against the corporate defendant only.

6 Black's Law Dictionary defines "bait and switch" as "[a] sales practice whereby a merchant advertises a low-priced product to lure customers into the store, only to induce them to buy a higher-priced product." (Black's Law Dictionary (8th ed. 2004), p. 152, col. 2.) Apex does not use the term "bait and switch" in the second cause of action but alleges conduct falling within the definition of that term.

warranty was shorter than normally provided by the manufacturer or that the manufacturer was insolvent and unable to honor the warranty.

The third cause of action for unfair competition is largely based on the wrongful acts alleged in the first and second causes of action. In addition, the third cause of action alleges that Fry's advertised secondhand or refurbished goods as new, and "advertis[ed] consumer goods which are sold only in multiple units but which are advertised at prices that are different than the minimum multiple unit price, a practice prohibited by Section 17504." The fourth cause of action is based on the wrongful acts alleged in the preceding causes of action and alleges that Fry's "intentionally committed various wrongful acts" that damaged Apex by disrupting its relationships with its customers.

Before trial, Bicknell moved for summary adjudication of the first, second and third causes of action on the ground he could not be held vicariously or secondarily liable for the wrongful acts alleged in those causes of action. The court granted the motion as to the first cause of action, ruling Bicknell could not be held liable under that cause of action because the evidence showed he "had no authority regarding Fry's price setting policy."

The first phase of the bifurcated trial was a jury trial on the first cause of action for violations of the UPA and fourth cause of action for intentional interference with prospective economic advantage. The jury filled out three special verdict forms addressing Apex's claims of below cost sales and loss leaders, locality discrimination, and prospective economic advantage, respectively. Fry's prevailed on all of these claims. Although the jury found Fry's sold merchandise below cost in San Diego, it answered

"yes" to the question, "Has Fry's proved, by a preponderance of the evidence, that in selling merchandise in San Diego below its cost, it did not have the purpose – that is, the conscious and positive desire – of injuring competitors or destroying competition?" On the locality discrimination verdict form, the jury found Fry's sold merchandise in San Diego at a lower price than in other locations at the same time, but answered "yes" to the question, "Has Fry's proved, by a preponderance of the evidence, that in selling merchandise in San Diego at a lower price than in other locations, it did not have the intent of injuring competitors or destroying competition, and that it did not know, to a substantial certainty, that this result would occur?"

On the intentional interference verdict form, the jury found that Fry's committed "intentional acts that were designed to disrupt, and that did actually disrupt, the relationship between Apex Wholesale and its customers . . . ." However, the jury found those acts were not "independently wrongful for one or more of the following reasons[]: [¶] a. Fry's advertised merchandise without intending to sell it; or [¶] b. Fry's used deceptive advertising; or [¶] c. Fry's sold secondhand merchandise as new."

Following the jury phase of the trial, the court heard evidence and argument on the equitable (i.e., second and third) causes of action for false advertising and unfair competition. The court initially issued a "Statement of Intended Decision" finding in favor of defendants on all of the claims asserted under those causes of action. In response, Apex filed a "Request for Statement of Decision Explaining the Factual and Legal Basis for the Court's Decision Regarding Controverted Issues," in which it asked the court to make over 650 evidentiary and legal findings. The court then directed

defendants to prepare a statement of decision and proposed judgment. Defendants filed a proposed statement of decision and Apex filed a 118-page response, which set forth 58 objections to defendants' proposed statement and listed hundreds of factual and legal issues it contended the court should decide.

After hearing argument on defendants' proposed statement of decision, the court ordered defendants to make a number of modifications to the statement and to modify their proposed judgment accordingly. As noted, the judgment the court ultimately entered permanently enjoins Fry's and Randy Fry from violating section 17504 by advertising the single unit price of goods sold only in multiple units unless the advertisement discloses the multiple unit price at least as prominently as the single unit price. The court rendered judgment in favor of defendants on all of Apex's other claims.

After the court entered judgment, Apex moved for a new trial, for JNOV as to the first cause of action, to vacate the judgment, and for cost of proof sanctions under former Code of Civil Procedure section 2033, subdivision (o). The court denied all of these motions.

## DISCUSSION

### I

### *APEX'S REQUEST FOR JUDICIAL NOTICE*

Apex requests that we take judicial notice of 46 separate items attached as exhibits to its request. We deny the request in its entirety.

"Although a court may judicially notice a variety of matters (Evid. Code, § 450 et seq.), only *relevant* material may be noticed." (*Mangini v. R. J. Reynolds Tobacco Co.*

(1994) 7 Cal.4th 1057, 1063 (*Mangini*).) If a document is relevant and subject to judicial notice, notice is taken of its existence but not of the truth of any matters asserted in it. (*Ibid.*) Although we may take judicial notice of matters that were not before the trial court, including records of another court (Evid. Code, §§ 459, subd. (a), 452, subd. (d)), we need not give effect to that evidence. (*Doers v. Golden Gate Bridge etc. Dist*. (1979) 23 Cal.3d 180, 184, fn. 1.)

Exhibits 1 and 2 to Apex's request for judicial notice are Federal Trade Commission (FTC) policy statements on unfairness and deception, respectively. Apex argues that these publications represent "the intent of the California Legislation contained in the California Code of Civil Procedure authorizing the underlying action."[7] Apex adds: "State Legislatures often look to the Federal Government when drafting new legislation. There is reason to believe the California State Legislature and the [FTC] share concepts of fairness and deception." Apex has not established or attempted to explain any connection between these FTC policy statements and any of the statutes underlying its claims against Fry's or any issue involved in this appeal. We deny judicial notice of these items on the ground they are irrelevant.

Exhibits 3 through 38 are documents reflecting the legislative history of section 17504. "[I]t is crucial to note that resort to legislative history is appropriate only where statutory language is ambiguous. . . . 'Our role in construing a statute is to ascertain the

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[7] Presumably, Apex intended to refer to legislation contained in the *Business and Professions Code* authorizing its claims regarding Fry's alleged unfair and deceptive acts and practices.

Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs. [Citation.]' [Citations.] Thus, '[o]nly when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning.' [Citations.]" (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29-30; see also *Tom v. City and County of San Francisco* (2004) 120 Cal.App.4th 674, 688 [request for judicial notice of certain portions of the legislative history of the Ellis Act and its amendments denied on the ground judicial notice was irrelevant to the court's determinations]; *JRS Products, Inc. v. Matsushita Elec. Corp. of America* (2004) 115 Cal.App.4th 168, 174 [request for judicial notice of legislative history denied because language of statute was plain and consideration of legislative history was therefore unnecessary].) Because, as we discuss *post*, we find no ambiguity in the language of section 17504 in question, we deny Apex's request for judicial notice as to exhibits 3 through 38.

Exhibits 39 and 40 reflect a 1999 settlement of various false advertising claims brought by the Arizona Attorney General against Fry's in Arizona state court. Exhibit 40 is an "Assurance of Discontinuance" setting forth the Attorney General's specific claims, Fry's denial of those claims, and Fry's assurance that it will comply with specified advertising standards. We decline to take judicial notice of these items because they are not relevant to any issue in this appeal.

Exhibits 41 and 42 are court orders filed in this case on August 29, 2003, while this appeal was pending. Exhibit 41 is an order and judgment of contempt against Fry's based on its willful failure to comply with the permanent injunction prohibiting it from violating section 17504. Exhibit 42 is an order denying a motion for nonsuit made by Fry's after opening statements on the order to show cause re contempt. We decline to take judicial notice of these items because they involve postjudgment matters that are not relevant to any issue in these appeals. It would be improper for us to consider the court's postjudgment finding that Fry's violated the injunction in deciding whether the court properly issued the injunction in the first instance. (See *People's Home Sav. Bank v. Sadler* (1905) 1 Cal.App. 189, 193-194 [appellate review is limited to consideration of the record of proceedings before the trial court; assignments of trial court error cannot be based on matters occurring after rendition of the appealed judgment and it would be irrelevant for the appellate court to entertain evidence of such subsequent matters].)

Exhibit 43 is a 2002 unpublished appellate opinion in an Orange County Superior Court action against Fry's. Apex asserts: "Exhibit 43 is relevant because it tends to make more probable an issue of material fact." Apex explains that Fry's engaged in similar discovery violations in both the present case and the Orange County case. Apex later asserts that Fry's actions in the Orange County litigation "are representative of [its] actions in the case at bar and consequently tend to prove an issue of material fact[:] that

Fry's willfully violated the court-ordered prohibitory injunction, and that said injunction was a valid exercise of judicial discretion."[8]

Essentially, Apex is asking us to take judicial notice of the opinion in the Orange County case because it evidences the truth of a factual assertion Apex makes on appeal, namely that Fry's did not make diligent and reasonable efforts to respond to discovery. We decline to do so because we are not a factfinding tribunal (see *In re Heather B.* (2002) 98 Cal.App.4th 11, 14 [it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law]). Apex offers no basis for taking judicial notice of the opinion other than its claimed evidentiary value.[9]

Exhibit 44 contains the contents of the Internet Web site of the National Institute for Literacy. Apex contends that the Web site is judicially noticeable under Evidence Code section 452, subdivision (h), which provides for discretionary judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Apex argues that the illiteracy statistics on the Web site are relevant to whether consumers can calculate prices of products advertised at a unit price but sold only in multiple units and were likely considered by the Legislature in enacting section

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8 Whether Fry's has violated the permanent injunction included in the judgment is not at issue in Apex's appeal or Fry's cross-appeal challenging the propriety of the court's *issuance* of the permanent injunction. Whether the court abused its discretion in issuing the injunction is a question of law we address in Fry's cross-appeal.

17504. We deny the request to take judicial notice of exhibit 44 because the statistics cited by Apex have no relevance to Apex's appeal or Fry's cross-appeal and, in any event, Apex has not shown that the statistics qualify as facts or propositions that are not reasonably disputable and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

Exhibits 45 and 46 are, respectively, a trial court memorandum of intended ruling and a request for statement of decision filed in the Superior Court of San Diego County case that resulted in the published opinion, *People v. Casa Blanca Convalescent Homes, Inc*. (1984) 159 Cal.App.3d 509 (*Casa Blanca*) In connection with the issue of the propriety of the statement of decision issued by the court in this case, Fry's compared Apex's request for a statement of decision with the request for statement of decision in *Casa Blanca,* which this court viewed as inappropriate because it required the trial court to answer over 75 questions and make numerous findings on evidentiary, as opposed to ultimate, facts. Apex requests that we take judicial notice of exhibits 45 and 46 "in order to properly distinguish the present matter from [the *Casa Blanca*] decision."

We deny the request to take judicial notice of Exhibits 45 and 46, as we consider it inappropriate to take judicial notice of trial court filings in an unrelated case resulting in a published appellate court opinion for the purpose of interpreting or distinguishing the published opinion. We can adequately determine *Casa Blanca*'s applicability to the

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9 We decline the invitation in Apex's reply to Fry's opposition to the request for judicial notice to treat the request as a motion to take additional evidence under Code of Civil Procedure section 909.

statement of decision issues raised in this appeal without resorting to the record of trial court proceedings in that case.

II

*FRY'S OBJECTION TO APEX'S NOTICE OF LODGMENT*

Fry's objects to Apex's notices of lodgment on the ground Apex transmitted the lodged exhibits late under California Rules of Court, rule 18(b).[10] Fry's requests that we not consider those exhibits. We deny Fry's request. Apex filed opposition to Fry's objection explaining that its late transmittal of exhibits was due to mistake and inadvertence of its counsel. This court has not been prejudiced or hampered by the late transmittal of exhibits and Fry's does not contend it was prejudiced by the late transmittal. Under these circumstances, we will exercise our discretion to overlook Apex's noncompliance with rule 18. (See *Marshallan Mfg. Co. of Cal. v. Brack* (1959) 172 Cal.App.2d 22, 23 [although court rules regarding appeals expedite the orderly conduct of the work of the appellate courts and should be observed, "the policy of our law is to favor hearings on appeal upon their merits when such can be done without violence to the rules"].)

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10 All further rule references are to the California Rules of Court. Under rule 18(b)(2), unless the reviewing court orders otherwise, within 20 days after the first notice of designation of exhibits is filed under rule 18(a),"[a]ny party in possession of designated exhibits returned by the superior court must put them into numerical or alphabetical order and send them to the reviewing court with two copies of a list of the exhibits sent. If the reviewing court clerk finds the list correct, the clerk must sign and return one copy to the party."

## III

## *APEX'S APPEAL*

### A. *The Court Committed Reversible Instructional Error with Respect to Apex's Fourth Cause of Action for Intentional Interference with Prospective Economic Advantage*

Apex's claim of prejudicial instructional error primarily centers around a limiting instruction drafted by Fry's entitled "Court's Instruction on Introduction of Evidence" (the limiting instruction). (Capitalization omitted.) During trial, Fry's filed a motion in limine to exclude testimony of Apex's advertising expert Michael Belch about various unfair business practices allegedly committed by Fry's. The court denied the motion but invited Fry's counsel to draft a limiting instruction distinguishing between claims to be decided by the court and claims to be decided by the jury, and explaining the purposes for which the jury was to consider Apex's evidence, including Belch's testimony.

After Fry's counsel submitted a proposed limiting instruction, he moved for a mistrial, arguing the instruction was insufficient to eliminate the prejudice caused by Belch's improper legal-conclusion testimony.[11] Apex submitted proposed changes to Fry's instruction and the court took Fry's motion for mistrial under submission. The court later presented the parties with a modified version of Fry's proposed instruction that incorporated changes proposed by Apex as well as modifications proposed by the court.

Fry's counsel voiced concern about the proposed limiting instruction, reminding the court: "In submitting this instruction, I indicated that it was, in essence, I don't know

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11 The court did not expressly rule on Fry's motion for mistrial.

if the phrase is under protest, but with considerable reluctance." Fry's counsel essentially argued that the jury would not understand the limiting instruction and would improperly construe the instruction as allowing it to consider all of the testimony of Apex's consumer witnesses about their negative experiences with Fry's as evidence of Fry's intent or purpose to injure competitors or competition.[12] Apex's counsel stated that "the jury instruction as proposed by the court is fine."

The court ultimately gave the limiting instruction as follows:

> "As I instructed you at the beginning of this case, plaintiff has alleged four causes of action against defendants. The first cause of action is for violations of the Unfair . . . Business Practices Act. The second cause of action is for false advertising. The third cause of action is for unfair competition. And the fourth cause of action is for intentional interference with [pro]spective economic advantage. I will be deciding the second and third causes of action. *Thus, I will decide whether Fry's engaged in false advertising and whether Fry's engaged in unfair competition*.
>
> "You are the trier of fact on the first and fourth causes of action. Thus, you will decide, for example, whether Fry's sold items below cost with the purpose to destroy competition. At the end of the case, I will instruct you regarding the law regarding the two causes of action[] you are to decide and you will decide the factual disputes between the parties in light of those instructions.
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> "With regard to first and fourth cause[s] of action[ that] you will decide[, ] I am allowing plaintiff to present testimony regarding Fry's advertising and business practices to you, the jury, for the limited purpose of determining whether defendants are liable to

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12 The court suggested that Fry's could "remedy" this concern by arguing that the Apex's customer-complaint evidence showed no more than bad customer relations on the part of Fry's and did not prove Fry's intent or purpose to injure competition. The court also suggested that Fry's could successfully object on the ground of relevance to customer-complaint testimony that did not evidence such purpose or intent.

> plaintiff under the first and fourth causes of action. For example, you have heard testimony about Fry's advertising from some of its customers and an expert witness called by the plaintiff. You are to consider that testimony and any later evidence that might be offered on these subjects for a limited purpose.
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> "Regarding the first cause of action, you may consider this evidence, but only to the extent that it may bear on whether, one, Fry's made sales below cost or sold loss leaders, as I will later define those terms, for the purpose of destroying competition in the San Diego electronics retail market generally, or for the purpose of injuring Apex or Abacus[13] in particular; or two, Fry's engaged in locality discrimination, as I will later define that term, with the intent to injure Apex or Abacus or to destroy competitors. *Regarding the fourth cause of action, you may consider this evidence, but only to the extent that it may bear on Fry's intent to interfere with the relationship between Apex or Abacus and its customers. Do not consider this evidence for any other purpose.*
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> "In instructing you that you may consider this evidence, I am not suggesting that I have made any finding on such evidence. I have made no such finding. I am also not suggesting that such evidence necessarily shows any wrongful purpose or intent on the part of defendants. I am only instructing you that you . . . may consider such evidence for the limited purposes stated." (Italics added.)

The court read the limiting instruction to the jury twice – first, during Apex's case-in-chief and a second time when it instructed the jury before deliberations. The limiting instruction was included in the written instructions the jury took into deliberations.

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13 Apex's second amended complaint states that Apex "is . . . the assignee of the rights and claims held by Abacus America, Inc., a California corporation." The second amended complaint explains that references to "Plaintiff" in the pleading are to Apex and "its assignor" collectively.

In connection with Apex's fourth cause of action for intentional interference with prospective economic advantage,[14] the court instructed on the privilege of competition with the following modified version of BAJI No. 7.86:

> "Ordinarily, a person who engages in business with the primary aim of making profits for himself or herself is not liable for business losses suffered by a competitor. The privilege of competition is an affirmative defense to a claim of interference with prospective economic advantage. [¶] The essential elements of the privilege of competition are[:] [¶] 1. The plaintiff and defendant were engaged in economic competition; [¶] 2. The economic relationship between the plaintiff and its customers concerns a matter involved in the competition between the plaintiff and defendant; [¶] 3. The defendant did not use wrongful means; and [¶] 4. The defendant's purpose was at least in part to advance its interest in competing with the plaintiff."

The court instructed on the definition of "wrongful means" or "wrongful conduct" with the following modified version of BAJI No. 7.86.1:

> "'Wrongful Means' or 'Wrongful Conduct' is conduct that is wrongful separate and apart from the fact that the conduct interfered with or disrupted the economic relationship between the plaintiff and its customers, and is also wrongful in the sense that the conduct considered by itself constitutes the bas[i]s for a claim of: [¶] 1. Unlawful sales below cost; [¶] 2. Locality Discrimination; [¶] 3. False Advertising; or [¶] 4. Unfair Competition."

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14 The court instructed the jury on the elements of intentional interference with prospective economic advantage with a modified version of BAJI No. 7.82 as follows: "The plaintiff Apex and its assignor Abacus also seek to recover damages based upon a claim of intentional interference with prospective economic advantage. [¶] The essential elements of such a claim are: [¶] 1. An economic relationship existed between the plaintiff and their [*sic*] customers containing a probable future economic benefit or advantage to plaintiff; [¶] 2. The defendant knew of the existence of the relationship; [¶] 3. The defendant intentionally engaged in wrongful acts or conduct designed to interfere with or disrupt this relationship; [¶] 4. The economic relationship was actually interfered with or disrupted; and [¶] 5. The wrongful conduct of the defendant which was designed to interfere with or disrupt this relationship caused damage to the plaintiff."

Thus, to find Fry's liable for intentional interference with prospective economic advantage, the jury was required to find that Fry's not only knowingly interfered with Apex's expectancy, "but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc* (1995) 11 Cal.4th 376, 393.) Accordingly, the "Special Verdict Re Interference" form directed that if the jury found under "Question No. 4"[15] that Fry's committed intentional acts that were designed to and actually did disrupt the economic relationship between Apex and its customers, it was to answer "Question No. 5," which read:

> "Were the acts committed by Fry's that disrupted the relationship between Apex . . . and its customers independently wrongful for one or more of the following reasons?
>
> "a. Fry's advertised merchandise without intending to sell it; or
>
> "b. Fry's used deceptive advertising; or
>
> "c. Fry's sold secondhand merchandise as new."

The jury answered "yes" to question No. 4 and "no" to question No. 5, resulting in judgment in Fry's favor on Apex's fourth cause of action.

Question No. 5 and the limiting instruction both conflict with the modified version of BAJI No. 7.86.1 that the court gave. Under the court's modified BAJI No. 7.86.1, the "independent wrongfulness" requirement for Apex's cause of action for intentional interference with prospective economic advantage was satisfied only if the jury found

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15 All subsequent references to question Nos. are to questions on the "Special Verdict Re Interference" form.

that Fry's engaged in independently wrongful conduct that, considered by itself, constituted the basis for a claim of *unlawful sales below cost, locality discrimination, false advertising, or unfair competition*.

The jury was likely confused by the fact that modified BAJI No. 7.86.1 directed it to consider whether Fry's engaged in independently wrongful conduct in the form of false advertising and unfair competition while the limiting instruction directed it *not* to decide whether Fry's engaged in false advertising or unfair competition because the court was to decide those issues. Adding to the confusion is the fact that Question No. 5 gave the jury only the following three bases for finding the independently wrongful element was satisfied: (1) Fry's advertised merchandise without intending to sell it; (2) Fry's used deceptive advertising; or (3) Fry's sold secondhand merchandise as new. The only one of these bases that the jury could have viewed as included in the court's instruction on independent wrongfulness (modified BAJI No. 7.86.1) is deceptive advertising, a form a false advertising. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc*. (1998) 17 Cal.4th 553, 562-563, citing *Committee On Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 211 ["'[A]ny advertising scheme involving false, unfair, misleading or deceptive advertising of food products equally violates"' the Sherman Law, the UCL [Unfair Competition Law] and the false advertising law"].) However, the limiting instruction prohibited the jury from deciding whether Fry's engaged in deceptive or false advertising.

In light of the limiting instruction's directive that the jury not decide whether Fry's engaged in false advertising, the jury was likely confused about the inclusion in question

No. 5 of deceptive advertising as a basis for finding that Fry's interference with the relationship between Apex and its customers (found under question No. 4) was independently wrongful. If the jury concluded that, under the limiting instruction, it was not allowed to make a "deceptive advertising" finding because whether Fry's engaged in "false advertising" was for the court to decide, question No. 5 left it only two possible bases for a finding that Fry's interference was independently wrongful: (1) Fry's advertised merchandise without intending to sell it or (2) Fry's sold secondhand merchandise as new. However, the jury was not adequately instructed on either of these bases for a finding of independent wrongfulness. As noted, modified BAJI No. 7.86.1, which specifically addressed the independent wrongfulness element, did not *expressly* refer to advertising merchandise without intending to sell it or selling secondhand merchandise as new as a basis for finding independent wrongfulness. The instructions on Apex's UPA claims addressed three claims: (1) selling merchandise below cost for the purpose of injuring competitors or destroying competition; (2) selling merchandise as a "loss leader" with the purpose to injure competitors or to destroy competition; and (3) engaging in locality discrimination with the intent to destroy the competition of an established dealer. None of the court's instructions on these UPA claims referred to advertising merchandise without intending to sell it or selling secondhand merchandise as new.

In addition to being inconsistent with modified BAJI No. 7.86.1 and question No. 5, the limiting instruction is problematic with respect to the fourth cause of action because it effectively precluded the jury from considering the testimony of Apex's lay

consumer witnesses and expert witness Belch on the element of independent wrongfulness. The limiting instruction directed the jury that, regarding the fourth cause of action, it could "consider this evidence, *but only to the extent that it may bear on Fry's intent to interfere with the relationship between Apex or Abacus and its customers*. *Do not consider this evidence for any other purpose*." (Italics added.) The plain meaning of this language is that the jury could consider the testimony of Apex's witnesses on the element addressed by question No. 4 – i.e., whether Fry's committed "intentional acts that were designed to disrupt, and that did actually disrupt, the [economic] relationship between Apex . . . and its customers" – but the jury could *not* consider Apex's witness testimony on the independent wrongfulness element addressed by question No. 5 – i.e., whether Fry's conduct that disrupted the relationship between Apex and its customers was independently wrongful. The limiting instruction effectively compelled a verdict in Fry's favor on the fourth cause of action by precluding the jury from considering any of Apex's testimonial evidence on the issue of independent wrongfulness. Significantly, the jury found in favor of Apex on Question No. 4, but answered "no" to Question No. 5, which defeated Apex's fourth cause of action for intentional interference with prospective economic advantage.[16]

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16 During its deliberations, the jury sent the court a note asking: "Re: Special Verdict Interference, question # 4, does 'intentional acts' mean 'intentional wrongful act.'?" This note suggests the jury was confused regarding the element of independent wrongfulness. The court's directed the jury to consider its question "in light of the other questions posed in the Special Verdict re: Interference and, more particularly, question # 5 which references 'wrongful.'"

A judgment in a civil case may be reversed for instructional error when the reviewing court, after examination of the entire cause, including the evidence, concludes that the error resulted in a miscarriage of justice. (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580 (citing Cal. Const. art. VI, § 13); *Huffman v. Interstate Brands Companies* (2004) 121 Cal.App.4th 679, 703.) Instructional "[e]rror is considered prejudicial when it appears probable that an improper instruction misled the jury and affected its verdict. [Citation.] As [the California Supreme Court has] observed, 'Whether a jury has been misled by an erroneous instruction *or by the overall charge* must be determined by an examination of all the circumstances of the case including a review of all of the evidence as well as the instructions as a whole.' [Citation.]" (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72, italics added; *Soule v. General Motors, supra*, 8 Cal.4th at pp. 580-581 [In deciding whether instructional error was prejudicial the court must "evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled" (fn. omitted)].)

"It is well settled that the giving of conflicting or contradictory instructions on a material point is error. [Citations.] The giving of an erroneous instruction is not cured by the giving of other correct instructions where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict. [Citations.]" (*Lewis v. Franklin* (1958) 161 Cal.App.2d 177, 185.) "Since the obvious purposes of instructions is to clarify the law for the jury, the giving of contradictory instructions resulting in a confused and

misleading picture[] can hardly be other than prejudicial error. In such a situation, respondent's assertion that '[t]he charge to the jury must be read as a whole,' is not a sufficient answer." (*Belletich v. Pollock* (1946) 75 Cal.App.2d 142, 147.)

Fry's contends Apex is barred by the doctrine of invited error from objecting to the limiting instruction on appeal because Apex did not object to the instruction below and proposed modifications to the instruction that the court incorporated into the final version it read to the jury. Fry's cites *Smith v. Americania Motor Lodge* (1974) 39 Cal.App.3d 1, 7 for the rule that "[u]nder the doctrine of invited error, 'if instructions are given by the court at the request of the opposing party, or on its own motion, the complaining party cannot attack them if he himself proposed *similar instructions*.' [Citations.]" (Original italics.) This rule is inapplicable here because Apex did not propose the limiting instruction or a similar instruction. Apex's participation in the creation of the instruction was merely to propose certain nonsubstantive modifications to the instruction, which was invited by the court and "proposed" (i.e., drafted) by Fry's.

Fry's also cites *People ex rel. Dept. of Transportation v. Salami* (1991) 2 Cal.App.4th 37 (*Salami*) for the proposition that, in Fry's words, "[a] party shall be deemed to have waived any objection that an instruction is misleading or incomplete if the party fails to propose additional or qualifying language addressing the purported deficiencies." (*Id.* at p. 42, fn. 2, citing *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948-949 (*Agarwal*), overruled on another point in *White v. Ultramar* (1999) 21 Cal.4th 563, 575, fn. 4.) The rule Fry's is referring to concerns instructions that are objected to as being too *general* or incomplete; it does not apply to instructions that are claimed to be

*misleading*. As stated in *Agarwal*, the rule is that "a party may not complain on appeal that an instruction correct in law is too general or incomplete unless he had requested an additional or qualifying instruction. [Citations.]" (*Agarwal, supra*, 25 Cal.3d at p. 948.) This rule is inapplicable because Apex is not objecting to the limiting instruction on the ground it is too general or incomplete.

The applicable rule to Apex's objection to the limiting instruction is the rule set forth in Code of Civil Procedure section 647, which provides that "the following are deemed excepted to: . . . giving an instruction, refusing to give an instruction, or modifying an instruction requested . . . ." *Agarwal* noted the distinction between the two rules: "'"To hold that it is the duty of a party to correct the errors of his adversary's instructions . . . would be in contravention of section 647, Code of Civil Procedure, which gives a party an exception to instructions that are given . . . . While the exception will be of no avail where an instruction states the law correctly but is 'deficient merely by reason of generality,' in other cases he will not be foreclosed from claiming error and prejudice."'" (*Agarwal, supra*, 25 Cal.3d at p. 949, quoting *Rivera v. Parma* (1960) 54 Cal.2d 313, 316.)

Although a party may not be relieved of the invited error rule by Code of Civil Procedure section 647 if the party *has requested or agreed to* an instruction (*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 759), the record here does not show that Apex requested or agreed to the limiting instruction, which the court invited and Fry's counsel drafted. Although Apex's counsel proposed minor changes and did not *expressly* object to Fry's proposed instruction, he essentially objected to the instruction's limitation

of the jury's consideration of the testimony of customer and expert witnesses called by Apex to the element of Fry's intent to interfere with the relationship between Apex its customers, stating: "If Fry's was out there and just competing fairly, then that is not an interference – that is a defense to intentional interference with economic advantage. But if they are cheating, if they are engaging in false advertising, in below cost sales and loss leaders, then they are using improper [i.e., independently wrongful] means to compete. *And that is one of the elements I have to show in my fourth cause of action*. . . . [¶] . . . [Fry's advertising is] misleading. It's deceptive. It's false. . . . That is the means, improper means of unfairly competing." (Italics added.) When the court pointed out that unfair competition was to be decided by the court, Apex's counsel responded: "Yes, Your Honor, but I wasn't meaning for the cause of action of unfairly competing, I was meaning the improper means of interfering with economic advantage . . . . [¶] . . . We have to show that their intent is to destroy the competition and *that they are doing it by unlawful means, or unfair means.*" (Italics added.) As noted, the limiting instruction precluded the jury from considering the testimony of Apex's witnesses on the "independent wrongfulness" element of the fourth cause of action.

It was only after the court made clear its intent to give the limiting instruction and informed the parties of its proposed modifications to the instruction that Apex's counsel stated, "[T]he jury instruction proposed by the court is fine." We do not view this as acquiescence by Apex in the giving of the limiting instruction per se, but merely as acquiescence in the court's proposed modifications to the instruction proposed by Fry's. Apex's acquiescence in the court's modifications did not constitute a waiver of the right to

challenge the limiting instruction on appeal. We deem the limiting instruction excepted to by Apex under Code of Civil Procedure section 647.

In any event, even if Apex's participation and acquiescence in the drafting and giving of the limiting instruction amounted to a waiver of objection to *that instruction*, the instructional error as to the fourth cause of action goes beyond the wording of the limiting instruction; it includes the conflict between that instruction and the modified version of BAJI No.7.86.1 given to the jury and between the modified version of BAJI No. 7.86.1 and the special verdict. Apex did not waive the right to argue on appeal that the court committed prejudicial instructional error with respect to the fourth cause of action for intentional interference with prospective economic advantage.

We conclude prejudicial instructional error occurred with respect to the fourth cause of action, as it appears probable that the inconsistencies between the limiting instruction, the modified version of BAJI No. 7.86.1 given by the court, and question No. 5 misled the jury and affected its verdict on the fourth cause of action. The limiting instruction conflicted with modified BAJI No. 7.86.1 on the material point of whether the jury could consider unfair competition and false advertising as bases for finding independently wrongful conduct under the fourth cause of action, and modified BAJI No. 7.86.1 conflicted with question No. 5 on the material point of the allowable bases for a finding of independently wrongful conduct. These inconsistencies, along with the limiting instruction's preclusion of the jury's consideration of the testimony of Apex's

witnesses on the element of independent wrongfulness, constitute prejudicial instructional error.[17]

B. *The Court Did Not Commit Prejudicial Instructional Error with Respect to Apex's First Cause of Action for Violations of the Unfair Practices Act (UPA)*

Apex contends the court committed prejudicial error with respect to the loss leader and sales below cost claims in Apex's first cause of action for violations of the UPA by instructing the jury that "purpose . . . to injure competitors or destroy competition" means having a "conscious and positive desire" to do so and using the phrase "conscious and positive desire" in special verdict questions regarding the loss leader and sales below cost claims.

Defining "purpose" under sections 17043 and 17044 as a "conscious and positive desire" accords with *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co*. (1999) 20 Cal.4th 163 (*Cel-Tech*). *Cel-Tech* considered the meaning of the word "purpose" in sections 17403 and 17044. Section 17043 provides: "It is unlawful for any person engaged in business within this State to sell any article or product at less that the cost thereof to such vendor, or to give away any article or product, *for the purpose of*

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17 Because we reverse the judgment as to the fourth cause of action based on the instructional error discussed above, we need not consider Apex's contentions that the court committed cumulatively prejudicial error by refusing Apex's "clarifying" instruction No. 125, refusing its requested BAJI No. 2.04 regarding Fry's failure to deny or explain instances of wrongful conduct, giving Fry's instruction No. 71 directing the jury to disregard Belch's "statement[s] or interpretation of the law," and refusing to give Apex's requested instructions regarding "bait and switch" and "used goods."

*injuring competitors or destroying competition.*" (Italics added.)[18] The plaintiffs in *Cel-Tech* argued that the word "purpose" under the statute should be given the same meaning as "intent" under tort law – i.e. that the "purpose" requirement is satisfied if "'the defendant believed or knew that harm was substantially certain to result, or that the manifest probability of harm was very great.'" (*Cel-Tech, supra,* at p. 172.)

Noting "that '"intent," in the law of torts, denotes not only those results the actor desires, but also those consequences which he knows are substantially certain to result from his conduct[]' [citation]," *Cel-Tech*(, *supra,* 20 Cal.4th at p. 172) concluded: "If section 17043 used the word 'intent' to describe the necessary mental state, plaintiffs' position might have merit. Section 17043, however, does not say 'intent'; it says 'purpose.' 'Intent' might be ambiguous; 'purpose' is not. [¶] 'Purpose' has a precise meaning." (*Cel-Tech, supra,* 20 Cal.4th at pp. 172-173.)

*Cel-Tech* noted that the drafters of the Model Penal Code defined "four distinct culpable mental states. None of the definitions uses the ambiguous word 'intent.' The code's two highest mental states are to act 'purposely' and to act 'knowingly.' [Citation.] Persons act 'purposely' with respect to a result if it is their 'conscious object' to cause that result. [Citation.] Persons act 'knowingly' with respect to a result if they are 'practically certain' their conduct will cause that result. [Citation.] The comment to the code

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18 Section 17044 provides: "It is unlawful for any person engaged in business within this State to sell or use any article or product as a 'loss leader' as defined in Section 17030 of this chapter." *Cel-Tech* held that section 17044 requires the same mental state as section 17043 – i.e., acting with the purpose of injuring competitors or destroying competition. (*Cel-Tech, supra,* 20 Cal.4th at pp. 175-178.)

explains the difference between purpose and knowledge. 'In defining the kinds of culpability, the Code draws a narrow distinction between acting purposely and knowingly, *one of the elements of ambiguity in legal usage of the term* "*intent*."'" (*Cel-Tech, supra,* 20 Cal.4th at p. 173, fn. omitted, italics added by *Cel-Tech*.) "'The essence of the narrow distinction between these two culpability levels is the presence or absence of a *positive desire* to cause the result; purpose requires a culpability beyond the knowledge of a result's near certainty.' [Citation.]" (*Ibid.*, original italics.)

*Cel-Tech* noted that the first Restatement of Torts also drew a distinction between purpose and knowledge, as reflected in its explanation that the "intentional act" element of battery is satisfied if the act in question is "'done for the purpose of causing the contact or apprehension *or* with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced.' [Citation.]" (*Cel-Tech, supra,* 20 Cal.4th at p. 174, italics added by *Cel-Tech*.) *Cel-Tech* observed that "[a]lthough the Restatement defines intent broadly as including both purpose and knowledge, it recognizes the narrow meaning of the word 'purpose.'" (*Ibid.*) *Cel-Tech* concluded: "We do not doubt that an actor who knows but does not desire that an act will cause a result might be deemed to intend that result, or that this intent or knowledge might be sufficient for some forms of tort liability. But these circumstances do not change the meaning of the word 'purpose.' We are interpreting a statute. Section 17043 uses the word 'purpose,' not 'intent,' not 'knowledge.' We therefore conclude that to violate section 17043, a company must act with the purpose, i.e., the *desire,* of injuring competitors or destroying competition." (*Id.* at pp. 174-175, italics added.)

Thus, *Cel-Tech* supports defining "purpose" within the meaning of sections 17043 and 17044 as a "desire," "conscious object," or "positive desire." Adding the adjective "conscious" to "positive desire" is inconsequential, as a "positive" desire is necessarily a "conscious" desire. Accordingly, defining "purpose" under sections 17043 and 17044 as a "conscious and positive desire" accords with *Cel-Tech*'s construction of those statutes.

Defining "purpose" as a "conscious and positive desire" also accords with the plain meaning of the term "purpose." The relevant definition of "purpose" is "something set up as an object or end to be attained." (Webster's Collegiate Dict. (11th ed. 1989) p. 957.) "Setting up something as an object or end to be attained" is not substantially different in meaning than "having a conscious and positive desire to attain an object or end." Accordingly, it is not reasonably probable the jury would have returned a different verdict had the court not defined "purpose" as a "conscious and positive desire." The court's definition of "purpose" does not constitute prejudicial error.

C. *The Court's Statement of Decision Is Not Prejudicially Defective*

Apex contends the court's statement of decision on Apex's second cause of action for false advertising under section 17500 and third cause of action for unfair competition under section 17200 is prejudicially defective in three respects: (1) it fails to address two of the three means of establishing competitor unfairness under *Cel-Tech*; (2) it fails to disclose the court's factual and legal reasoning in concluding there was no "incipient violation" of law; and (3) it fails to address principal controverted issues alleged in the third cause of action of Apex's second amended complaint as to which Apex presented substantial evidence.

Under Code of Civil Procedure section 632, "[u]pon the timely request of one of the parties in a nonjury trial, a trial court is required to render a statement of decision addressing the factual and legal bases for its decision as to each of the principal controverted issues of the case. [Citation.] A statement of decision need not address all the legal and factual issues raised by the parties. Instead, it need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision. [Citations.] '[A] trial court rendering a statement of decision under . . . [Code of Civil Procedure] section 632 is required to state only ultimate rather than evidentiary facts because findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them. [Citation.]' [Citations.]" (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125.)

Code of Civil Procedure section 634 provides: "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court . . . prior to entry of judgment . . . , it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue." However, this section "'does not require that a finding be made as to every minute matter on which evidence is received at the trial . . . .'" (*Davis v. Kahn* (1970) 7 Cal.App.3d 868, 880, quoting *Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 410.)

1. *The statement of decision adequately applies the Cel-Tech test for competitor unfairness*

*Cel-Tech* required "that any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." (*Cel-Tech, supra,* 20 Cal.4th at pp. 186-187.) Accordingly, *Cel-Tech* adopted the following test: "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id.* at p. 187, fn. omitted.)

We conclude the court's statement of decision adequately applies *Cel-Tech* to Apex's competitor unfair competition claims and includes sufficient ultimate fact findings as to those claims. In reaching that conclusion, we are mindful that Apex sought injunctive and restitutionary relief under its second and third cause of action – the only available remedies under the relevant statutes.

The statement of decision quotes *Cel-Tech*'s test for unfair conduct in a direct competitor claim under section 17200. After listing the controverted issues raised by Apex's second and third causes of action, the court found Apex met its burden of proof on its claim that Fry's violated section 17504. Regarding the remaining controverted issues under the second and third causes of action, the statement of decision states: "[T]he Court has considered the evidence and testimony of the consumer witnesses and expert

witnesses called by [Apex] and evidence and testimony, presented by Fry's personnel and expert witnesses called by the Defendants, and finds that the evidence presented by the Defendants preponderates and overcomes the presumptions against the Defendants. Those presumptions are contained within Sections 17071 and 17071.5 of the Business and Professions Code relating to below cost sales and locality discrimination in the former and below cost sales in the latter."

The court noted that as to each type of wrongful conduct shown by Apex, Fry's presented opposing evidence. The court stated: "Such opposing evidence consisted occasionally of, not a refutation that the act had occurred, but an explanation for it. Other opposing evidence persuaded the Court that the act, if unexplained, was aberrational. The opposing evidence also consisted of policies and procedures the Defendants have implemented, some even since the filing of the subject case, to prevent violations of Sections 17200 and 17500. While [Apex] has shown that some of the acts . . . took place after the dissemination of those policies and procedures, those policies and procedures nevertheless indicate the desire of corporate management to not run afoul of the false advertising and unfair competition laws." The court found Apex had not met its burden of proving that such isolated and inadvertent incidents amounted to a violation of false advertising and unfair competition law.

Accordingly, the court found that except for the violation of section 17504, Apex "did not prove, by a preponderance of the evidence, that Defendants disseminated advertising (i) as part of a plan or scheme the intent of which was not to sell goods as advertised; or (ii) that contained statements that were untrue or misleading and which the

defendant knew, or in the exercise of reasonable care should have known, are untrue or misleading." The court summarized: "Other than as to Section 17504, with respect to Section 17200, . . . the Court finds [Apex] has failed to meet its burden of proof that Defendants engaged in 'unlawful' acts or practices; the Court also finds that [Apex] failed to carry its burden of proof that Defendants engaged in 'unfair' practices with respect to [Apex's] claims as a competitor, as that term is defined in *Cel-Tech*, in that there was no incipient violation of the law . . . ."

The court concluded that "one or two, or even a few instances of [Fry's] alleged misconduct" were insufficient "to warrant either injunctive relief to prevent the practice from occurring in the future or restitution to the victims to make them whole[.]" Elaborating on that point, the court stated: "[Apex] has failed to meet its burden of proof by the preponderance of the evidence to obtain the relief sought. The Court is not persuaded that the past acts result in a reasonable probability that such acts will continue in the future. The Court is convinced that such is the standard to obtain injunctive relief, even in unfair competition cases. As to some of the specific instances of alleged misconduct, opposing evidence was presented persuading the Court that the acts or practices have been discontinued. [¶] Thus, even if there were found to be separate, isolated acts that allegedly violate Sections 17200 or 17500, [Apex] cannot receive the relief for which it has prayed. The Court has very carefully weighed all of the evidence, including percipient and expert witnesses, and matters subject to judicial notice, and finds that [Apex] has not proven its case other than a violation of . . . Section 17504."

As noted, Apex argues the court committed reversible error in its statement of decision by failing to address two of the three means of establishing competitor unfairness under *Cel-Tech* and defectively addressing the third means. Specifically, Apex complains that the statement of decision does not (1) address whether Fry's loss leader sales, sales below cost, and locality discrimination had the same or similar effect as a violation of law; (2) address whether that conduct significantly threatened or harmed competition; or (3) disclose the court's factual and legal reasoning in concluding there was no "incipient violation" of law.

We reiterate that a statement of decision need only state ultimate facts "because findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them. [Citation.]' [Citations.]" (*Muzquiz v. City of Emeryville, supra,* 79 Cal.App.4th at p. 1125.) Here, the statement of decision includes the ultimate finding that Fry's had not engaged in conduct falling within any part of the test articulated in *Cel-Tech* for determining whether a direct competitor's business conduct is "unfair" within the meaning of section 17200. The statement of decision set forth *Cel-Tech*'s entire three-part definition of competitor unfairness and stated that Apex "failed to carry its burden of proof that Defendants engaged in 'unfair' practices with respect to [Apex's] claims as a competitor, *as that term is defined in Cel-Tech*, in that there was no incipient violation of the law . . . ." (Italics added.) The court's reference to *Cel-Tech*'s definition of "unfair," which the court set forth earlier in the statement of decision, constitutes an adequate ultimate factfinding that Fry's did not engage in unfair conduct under any part of the definition.

The court's explanatory finding that "there was no incipient violation of the law" further supports our conclusion that the statement of decision sufficiently addressed *Cel-Tech*'s test for unfair conduct by a direct competitor. "Incipient" means "beginning to come into being or to become apparent." (Webster's Collegiate Dict. (11th ed. 1989) p. 609.) Accordingly, we construe *Cel-Tech's* reference to "conduct that threatens an incipient violation of an antitrust law" (*Cel-Tech, supra*, 20 Cal.4th at p. 187) to mean a business act or practice that does not actually violate antitrust law, but potentially could lead to a violation of antitrust law if allowed to continue or expand. (See *State of California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1167, 1168 [distinguishing between mergers that actually threaten or restrain competition and those that pose merely *incipient* threats to competition]; *F. T. C. v. Lancaster Colony Corp., Inc*. (D.C.N.Y. 1977) 434 F.Supp. 1088, 1097 [federal statute giving the Federal Trade Commission (FTC) the right to seek injunction against an entity about to violate any law enforced by the FTC "reflects a continuing congressional concern with the means of halting *incipient* violations of [statute concerning unlawful corporate mergers] *before they occur*," italics added].)

The court's finding that Fry's conduct did not even threaten the *inception* of an antitrust violation implies the finding that Fry's conduct did not violate "the policy or spirit of [an antitrust law] *because its effects are comparable to or the same as a violation of the law*." (*Cel-Tech, supra*, 20 Cal.4th at p. 187, italics added.) Likewise, the court's express finding that "one or two, or even a few instances of alleged misconduct [were insufficient] to warrant either injunctive relief to prevent the practice from occurring in

the future or restitution to the victims to make them whole" implies the finding that Fry's conduct shown by the evidence did not significantly threaten or harm competition. The court's statement of decision adequately applied *Cel-Tech*'s test for competitor unfairness under section 17200.

2. *The statement of decision adequately addresses the principal controverted issues under the third cause of action*

Apex contends the statement of decision is prejudicially defective because it fails to address principal controverted issues under Apex's third cause of action. Apex argues the statement of decision should have addressed the elements of each of the statutory violations alleged in the second amended complaint as to which Apex presented evidence at trial, instead of disposing of the third cause of action with the "general omnibus finding" that Apex failed to meet its burden of proving that Fry's engaged in unlawful acts or practices.

As Fry's points out, Apex's request for statement of decision was 109 pages long and sought hundreds of detailed, evidentiary findings. Addressing a similarly burdensome request for statement of decision, the Court of Appeal in *Casa Blanca* stated: "Such a requirement cannot be made of the court. [Citation.] [The requesting party] seeks an inquisition, a rehearing of the evidence. The trial court was not required to provide specific answers so long as the findings in the statement of decision fairly disclose the court's determination of all material issues. [Citation.]" (*Casa Blanca, supra,* 159 Cal.App.3d at p. 525, disapproved on another point in *Cel-Tech*, *supra,* 20 Cal.4th at pp. 184-187.)

"[W]hen matters covered by the findings defeat a plaintiff's right of recovery the trial court is not required to make additional findings upon other issues." (*Aguirre v. Fish and Game Commission* (1957) 151 Cal.App.2d 469, 473.) Specific findings are not required if they are necessarily implied by a general finding, and a "'finding on a particular issue is an implied negation of all contradictory propositions.'" (*St. Julian v. Financial Indem. Co.* (1969) 273 Cal.App.2d 185, 194.) The court's ultimate finding that Fry's did not engage in conduct warranting injunctive relief or restitution – the only relief available under the second and third causes of action – obviated the need for the myriad evidentiary findings Apex requested under those causes of action.

Apex relies on *Schaefer v. Berinstein* (1960) 180 Cal.App.2d 107, 123 (disapproved on another point in *Jefferson v. J.E. French Co.* (1960) 54 Cal.2d 717, 719) for the proposition that a "general omnibus finding" is insufficient because it is uncertain and it cannot be determined what averments were deemed material by the trial court. *Schaefer* is inapposite, as the trial court in that case issued a decision containing adequate specific findings but closing with the statement: "'All material allegations of the third amended complaint and the answers thereto which are in conflict with the facts herein found to be true are not true.'" (*Schaefer, supra,* 180 Cal.App.2d at p. 123.) Here, the court did not simply state that all material allegations under Apex's third cause of action that conflicted with the findings in the statement of decision were untrue. The court found, as an ultimate fact, that Fry's did not engage in the unlawful acts or practices alleged by Apex and committed only isolated acts of misconduct that did not warrant injunctive relief because they were not likely to continue.

Apex also cites *Bellerue v. Business Files Institute, Inc.* (1963) 215 Cal.App.2d 383, in which the appellate court viewed the trial court's finding that two parties were the "alter ego" of the corporate defendant as "[a] mere statement of the ultimate legal issue to be determined in 'figurative terminology' [and therefore] not an appropriate finding of fact." (*Id.* at p. 395.) *Bellerue* rejected this legal conclusion stated in the form of a finding because the trial court made no findings to support it and, more important, there was no *evidence* to support any such findings. (*Id.* at pp. 395-399.)

In contrast, the court's ultimate finding that Fry's did not engage in the unlawful acts or practices alleged in Apex's third cause of action is supported by other findings and references to evidence in the statement of decision. The court referred to "the evidence and testimony of the consumer witnesses and expert witnesses called by [Apex] and evidence and testimony, presented by Fry's personnel and expert witnesses" and found the evidence overcame the statutory presumptions of below cost sales and locality discrimination. The court further found noted that Fry's evidence showed that the wrongful conduct claimed by Apex either did not occur, could be explained, or, with the exception of the violation of section 17504, consisted of "isolated and inadvertent incidents" that did not amount to a violation of false advertising and unfair competition law warranting injunctive relief or restitution. Accordingly, the court found that Apex "did not prove, by a preponderance of the evidence, that Defendants disseminated advertising (i) as part of a plan or scheme the intent of which was not to sell the goods as advertised; or (ii) that contained statements that were untrue or misleading and which the defendant knew, or in the exercise of reasonable care should have known, were untrue or

misleading." The court did not make improper "general omnibus findings" or arrive at unsupported legal conclusions in the guise of making ultimate fact findings.

Fry's argues Apex should not be heard to complain about the court's failure to make specific findings because Apex did not draft proposed findings for the court to consider. Fry's relies on *Moreno v. Jessup Buena Vista Dairy* (1975) 50 Cal.App.3d 438 (*Moreno*) in which the Court of Appeal concluded the trial court properly refused to make special findings requested by the appellant because "appellant did not propose in specific language any finding for the court to approve or to disapprove." (*Id.* at p. 447.)

Apex contends this analysis from *Moreno* is not the law because *Moreno* was decided before the 1981 amendment of Code of Civil Procedure section 634. Apex asserts that under current law it was not required to propose a competing statement of decision; it was sufficient that it "propounded specific objections to the statement of decision that was drafted by Fry's and blessed by the [trial] court." Apex does not explain how the 1981 amendment of the statute affects *Moreno*'s analysis. When *Moreno* was decided, Code of Civil Procedure section 634 stated: "When written findings and conclusions are required, and the court has not made findings as to all facts necessary to support the judgment or a finding on a material issue of fact is ambiguous or conflicting, and the record shows that such omission, ambiguity or conflict was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under [Code of Civil Procedure] Section 657 or 663, it shall not be inferred on appeal or upon a motion under [Code of Civil Procedure] Section 657 or 663 that the trial court found in favor of the prevailing party as to such facts or on such issue."

Although the 1981 amendment rewrote Code of Civil Procedure section 634 to be more concise and refer to a "statement of decision" instead of "written findings and conclusions," it did not substantively change the effect of the statute. Neither version of the statute addresses whether a party requesting specific findings in a statement of decision must draft the requested findings for the court to approve or disapprove. *Casa Blanca, supra,* 159 Cal.App.3d 509, which was decided in 1984 after the 1981 amendment of Code of Civil Procedure section 634 became effective, cited with approval *McAdams v. McElroy* (1976) 62 Cal.App.3d 985 (*McAdams*), in which the Court of Appeal followed the rule articulated in *Moreno*.[19]

*Casa Blanca* and other cases approving the practice of providing the court with proposed drafts of requested special findings have not been disapproved or superseded by statute. The court adequately addressed the principal controverted issues under the third cause of action through findings of ultimate fact, and Apex did not submit proposed

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19 *Casa Blanca* stated "In [*McAdams*] it was said: '" The established practice presupposes that counsel desiring such special findings will draft and propose them in the usual form [citation]. The action of the court in approving or disapproving them will constitute the ruling. Appellants here sought to conduct a general inquisition and neither drafted nor submitted any proposals for such consideration."' [Citation.] [¶] [*McAdams*] went on to say submission of a request without resolution is improper because: 'That practice unfairly burdens the trial judge in that he must not only speculate which questions embrace ultimate as distinguished from evidentiary facts, but also search his recollection of the record without the assistance of a suggestion from counsel. Particularly if there is evidence which would tend to give a multiple choice in answering the interrogatory, the court should have guidance from the requesting party.' [Citation.]" (*Casa Blanca, supra,* 159 Cal.App.3d at pp. 525-526.)

specific findings for the court to approve or to disapprove. We find no error in the statement of decision as to the third cause of action.

D. *The Judgment on the Equitable Causes of Action Is Supported by Substantial Evidence*

Apex contends that the judgment as it relates to Apex's claims for competitor unfairness and consumer claims brought on behalf of the general public is not supported by the evidence. This section of Apex's opening brief is largely a continuation of Apex's argument that the statement of decision is defective because it did not include certain specific findings Apex asked the court to make. As we discussed above, we conclude the statement of decision adequately applies *Cel-Tech* to Apex's competitor unfair competition claims and includes sufficient ultimate fact findings as to those claims.

Regarding its consumer claims brought on behalf of the general public, Apex complains that the statement of decision did not specifically address its claim that the term "sale" as used in Fry's advertising was untrue and that there is insufficient evidence to support the court's finding that this deceptive advertising practice is not likely to continue. Apex also contends it met its burden of proof on its claim that Fry's advertises used goods for sale as new in violation of Business and Professions Code section 17531 and Civil Code section 1770, subdivision (a)(6), and there is insufficient evidence to support the court's finding that Fry's has discontinued this offending conduct. We reject these contentions because substantial evidence supports the court's discretionary decision that neither the injunctive nor restitutionary relief available under the statutory claims in question was warranted.

"In reviewing a challenge to the sufficiency of the evidence, we are bound by the substantial evidence rule. All factual matters must be viewed in favor of the prevailing party and in support of the judgment. All conflicts in the evidence must be resolved in favor of the judgment. [Citation.]" (*Heard* v. *Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1747.)

To prevail on a cause of action under the UCL, it is not enough to show the defendant committed wrongful acts or statutorily prohibited conduct; plaintiff must also show entitlement to equitable relief. If the court determines the equitable relief available under the UCL is not warranted, judgment for defendant is appropriate. (See *Madrid v. Perot Systems Corp*. (2005) 130 Cal.App.4th 440, 467 [demurrers to complaint brought under UCL were properly sustained without leave to amend on the ground complaint failed to state a UCL claim because plaintiff failed to state a viable claim for restitution or injunctive relief (the only remedies available) and failed to propose any amendment that would cure the defect].)

The court has very broad discretion in deciding "which, if any, remedies authorized by section 17203 should be awarded. [¶] . . . Section 17203 does not mandate restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court '*may* make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or as may be necessary to restore . . . money or property.' [Citation.] That is, as our cases confirm, a grant of broad equitable power. A court cannot properly exercise an equitable power without consideration of the equities on both sides of a

dispute." (*Cortez v. Purolator Air Filtration Products Co*. (2000) 23 Cal.4th 163, 180.) "Therefore, in addition to those defenses which might be asserted to a charge of violation of the statute that underlies a UCL action, a UCL defendant may assert equitable considerations. In deciding whether to grant the remedy or remedies sought by a UCL plaintiff, the court must permit the defendant to offer such considerations. In short, consideration of the equities between the parties is necessary to ensure an equitable result." (*Id.* at pp. 180-181.) Thus, the issue raised by Apex's challenge to the sufficiency of the evidence to support the judgment on the equitable causes of action is not so much whether there was substantial evidence that Fry's engaged in the conduct alleged in those causes of action, but whether the court abused its discretion in deciding the conduct proved by Apex did not warrant equitable relief.

As noted, the court decided that with the exception of the violation of section 17504, Apex "failed to meet its burden of proof by the preponderance of the evidence to obtain the relief sought." The court's decision was primarily based on its finding that Fry's either had a satisfactory explanation for the acts forming the basis of Apex's false advertising and unfair competition claims, or the acts were too infrequent, inadvertent, or aberrational to warrant injunctive relief.[20] The evidence presented at trial reasonably supports that finding, and Apex does not expressly challenge it on appeal. The court

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20 The court twice made the point in its statement of decision that "one or two, or even a few inadvertent instances of alleged misconduct, depending upon the specific type of business act or practice shown, are [insufficient] to prove a violation of either [section] 17200 or 17500 *sufficient to warrant injunctive relief*." (Italics added.)

acted within its sound discretion in deciding that with the exception of Fry's violations of section 17504, the facts proved under Apex's equitable causes of action were insufficient to warrant equitable relief.[21]

E. *The Court Did Not Err in Denying Apex's Motion for JNOV as to the First Cause of Action for Violation of the UPA*

Apex contends the court should have granted its motion for JNOV as to its first cause of action for violation of the UPA because Fry's evidence was insufficient as a matter of law to rebut the presumption of injurious intent under sections 17071 and 17071.5 as to Apex's claim that Fry's made sales below cost in violation of sections 17043 and 17044. Section 17071 provides: "In all actions brought under this chapter proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition." Section 17071.5 provides, in relevant part: "In all actions brought under this chapter proof of limitation of the quantity of any article or product sold or offered for sale to any one customer to a quantity less than the entire supply thereof owned or possessed by the seller or which he is otherwise authorized to sell at the place of such sale or offering for sale, together with proof that the price at which the article or product

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[21] The court's rejection of Apex's claim that Fry's sold used goods as new is also supported by substantial evidence in the form of testimony by Fry's cofounder Kathryn Kolder and employee Scott Anderson that when Fry's places a returned item on the shelf for resale, its practice is to place a sticker on the item that identifies it as having been returned or unpackaged.

is so sold or offered for sale is in fact below its invoice or replacement cost, whichever is lower, raises a presumption of the purpose or intent to injure competitors or destroy competition." In denying Apex's motion for JNOV as to the first cause of action, the court effectively concluded Fry's sufficiently rebutted these statutory presumptions by presenting evidence that its loss leader sales were undertaken to expand its customer base.[22]

"A trial court must render judgment notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted. (Code Civ. Proc., § 629.) A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support. [Citation.] [¶] The moving party may appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict, or both. [Citation.] As in the trial court, the standard of review is whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion. [Citations.] (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

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22 The court did not expressly rule that Fry's presented sufficient evidence to rebut the section 17071 and 17071.5 presumptions; that ruling is necessarily implied by the court's rejection of Apex's contention that "[Fry's] evidence that loss leader sales were undertaken to expand [Fry's] customer base . . . is insufficient to rebut the statutory presumptions because [Fry's] proffered explanations do not fall within a statutory exception [or] constitute a business necessity."

Apex argues that two cases taken together – *E&H Wholesale, Inc. v. Glaser Bros.* (1984) 158 Cal.App.3d 728 (*E&H*) and *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 113-114 (*Pay Le*ss) – compel the conclusion that Fry's failed to rebut the presumption of injurious intent under sections 17071 and 17071.5 as a matter of law. Apex relies on *Pay Less* for the proposition that where none of the express statutory exceptions (set forth in section 17050)[23] to the UPA prohibitions against sales below cost and loss leaders apply, a seller of goods below cost can rebut the presumption of injurious intent under sections 17071 or 17071.5 only by showing a good faith *necessity* for its sales below cost. Apex relies on *E&H* for the proposition that a mere denial of injurious intent, standing alone, is insufficient to rebut the statutory presumptions. Apex contends the evidence Fry's presented at trial amounted to mere denial of injurious intent

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23 Section 17050 provides: "The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made: [¶] (a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation; provided, notice is given to the public thereof. [¶] (b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof. [¶] (c) By an officer acting under the orders of any court. [¶] (d) In an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade. [¶] (e) In an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade. [¶] The notice required to be given under this section shall not be sufficient unless the subject of such sales is kept separate from other stocks and clearly and legibly marked with the reason for such sales, and any advertisement of such goods must indicate the same facts and the number of items to be sold."

and that Fry's made no showing of a good faith necessity for its sales below cost or that its sales below cost fell within any section 17050 exception.

Addressing the statutory presumption of injurious intent now codified in section 17071, *Pay Less* observed: "[A]n injurious effect is not an essential element of the [UPA] violation. The violation is complete when sales below cost are made with the requisite intent and not within any of the [statutory] exceptions. Proof of injurious effect is permitted to be shown with the proof of sales below cost as presumptive or prima facie evidence that the requisite intent existed. The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing of wrongful intent. They may present facts showing that they were within the express exceptions regardless of actual intent; *or they may introduce evidence of another necessity not expressly included to show that sales were made in good faith and not for the purpose of injuring competitors or destroying competition*." (*Pay Less, supra,* 25 Cal.2d at pp. 113-114, italics & underscoring added.)

In *Dooley's Hardware Mart v. Food Giant Markets, Inc.* (1971) 21 Cal.App.3d 513 (*Dooley's Hardware*), the Court of Appeal stated that its "view of how [the section 17071.5 presumption may be rebutted] is akin to that of our Supreme Court in [*Pay Less*] in regard to the [section] 17071 presumption. We believe that defendants may rebut the [section] 17071.5 presumption either by evidence tending to bring them within one of the exceptions to the prohibitions contained in the Act *or by evidence establishing otherwise*

*that they did not have the requisite wrongful intent*." (*Dooley's Hardware, supra,* 21 Cal.App.3d at p. 518, italics added, fn. omitted.)

We do not construe *Pay Less*'s reference to "evidence of another necessity" as imposing a *requirement* that such evidence be presented to rebut the statutory presumption of injurious purpose where none of the section 17050 exceptions apply. Although a defendant may be able to show it made below-cost sales in good faith and not for the purpose of injuring competitors or competition by introducing evidence of "another necessity," this does not mean the requisite showing of good faith can *only* be made by presenting evidence of a business necessity. We conclude that a defendant may rebut a [section] 17071 or [section] 17071.5 presumption by presenting *any* evidence upon which the trier of fact can reasonably find that the defendants' below-cost sales were not made for the purpose of injuring competitors or destroying competition. Our conclusion accords with *Dooley's Hardware*'s observation that "defendants may rebut the [section] 17071.5 presumption either by evidence tending to bring them within one of the exceptions to the prohibitions contained in the Act or by evidence establishing *otherwise that they did not have the requisite wrongful intent*." (*Dooley's Hardware, supra,* 21 Cal.App.3d at p. 518, italics added, fn. omitted.; see also *Western Union Financial Services, Inc. v. First Data Corp.* (1993) 20 Cal.App.4th 1530, 1540 [defendant rebutted section 17071 presumption by presenting evidence that its promotional sales below cost were made with the good faith intent of increasing and maintaining its customer base]; *Tri-Q, Inc. v. Sta-Hi Corp*. (1965) 63 Cal.2d 199, 209 (*Tri-Q*) [defendant company

president's testimony that he was unaware of any attempt to destroy plaintiff's business was sufficient to rebut section 17071 presumption of injurious purpose].)

*E&H* does not compel a different conclusion. In *E&H,* the plaintiff, a competitor of the defendant cigarette wholesalers, alleged the defendants violated section 17043 of the UPA by selling cigarettes below cost with the intent to injure or destroy competition. (*E&H, supra,* 158 Cal.App.3d at pp. 732-733.) The plaintiff appealed the trial court's denial of its requests for a temporary restraining order and preliminary injunction, contending the court abused its discretion by determining the defendants had not violated section 17043. (*E&H, supra,* 158 Cal.App.3d at p. 732.) The Court of Appeal agreed. Although the president of one of the defendant companies filed a declaration denying the company acted with the intent to injure the plaintiff or to destroy competition (*id.* at p. 736), the president of another of the defendant companies testified he routinely solicited new customers by offering to sell them cigarettes at prices he arbitrarily set to beat the prices they were paying to their current cigarette distributors. (*Id.* at pp. 736-737.) The Court of Appeal concluded this testimony clearly established that defendants violated section 17043. (*E&H, supra,* 158 Cal.App.3d at pp. 737-738.)

*E&H* did not hold generally that a defendant's denial of intent to injure competition is insufficient to rebut the statutory presumption of injurious intent; *E&H* simply concluded that one defendant's testimony denying an intent to injure the plaintiff was insufficient to rebut the presumption in light of contrary testimony of another defendant showing that "defendants were not concerned with determining the price of cigarettes pursuant to the statutory criteria" (*E&H, supra,* 158 Cal.App.3d at p. 737) and

clearly indicating "that defendant's determination of price was purposely calculated to obtain business by undercutting prices offered by their competitors." (*Ibid*.) *E&H* concluded: "Given such testimony, evidencing defendant's clear intent to undercut prices regardless of the statutory criteria, we cannot construe the record as sufficient to overcome the presumption of intent to injure competition. Thus, we find the trial court's denial of plaintiff's request for a preliminary injunction a '" manifest miscarriage of justice "' [citation], for defendants have clearly violated section 17043." (*E&H, supra,* 158 Cal.App.3d at pp. 737-738.)

The evidence here does not similarly establish a clear violation of section 17043 or section 17044. In *E&H* – a dispute between competing wholesale distributors of a particular product – the evidence showed that the defendants, engaged in the routine business practice of getting a potential customer to disclose the price it was paying its current cigarette distributor and then offering *that customer* (as opposed to customers generally) a lower price arbitrarily set for the purpose of stealing the customer from the competing distributor. Here, there is no evidence that Fry's routinely offered individual customers below-cost prices that Fry's sales representatives arbitrarily set "on the spot" for the purpose of injuring a specific competitor with whom the customer had an ongoing business relationship. Although there was evidence that Fry's occasionally sold merchandise below cost to *beat* a competitor's price, there was abundant evidence to support the finding that Fry's below-cost prices generally were set to *meet* the temporary sale prices of competitors. The evidence does not show that Fry's routinely undercut its competitors' prices for the purpose of stealing specific customers from competitors, as did

the defendants in *E&H*. Rather, the record contains substantial evidence that Fry's generally advertised below-cost prices on different items at different times to attract customers who might otherwise buy on the internet or at a competing store – i.e., to expand its customer base, and not to injure specific competitors or competition generally.

Paul Friday, employed by Fry's as a buyer, testified that he never set prices to meet competitors' prices with the intent to injure or destroy competition. Until Apex filed the instant action against Fry's, Friday had never heard of Apex while working in Fry's San Diego store.

Kathryn Kolder, who is Fry's executive vice president, corporate secretary, and one of the company's founders, was asked if she ever heard any participant in Fry's top management meetings communicate a desire to see Fry's injure or destroy a competitor. Kolder responded: "You, know, it's actually the exact opposite. We talk about making the pie bigger . . . and strengthening the competitors. Because any time one of our competitors is hurt, it actually hurts us." Kolder explained that customers prefer to shop when there is more excitement in the market, and, for that reason, Fry's almost always located its stores one of its major competitors. She never heard any management person at Fry's say words to the effect that he or she wanted to injure or destroy a particular competitor or competition in general. She also had never heard of Apex and certain other competitors (e.g., Toner Express, Rom Emporium and Hot Chip) before the instant litigation. Kolder explained that one reason Fry's sold certain items below cost was to meet the prices of certain competitors who were able to buy at lower prices than Fry's because they were much larger than Fry's. Kolder stated: "[S]o our . . . cost is [going to]

be higher . . . than whatever it is they are running it for, which . . . may or may not be above their cost . . . , but they will be running it so low that we have to take it below cost in order to compete on those items. And because we don't ever want to be perceived by our . . . customer base as not being able to compete, you know, no matter who we are, what size we are compared to them."

Raymond Cheng, Fry's director of software merchandising and operations, testified that Fry's sold below cost to bring customers into the store. He had never heard any management employees of Fry's say that they wanted to injure or destroy a competitor or competition. Cheng had never heard of Apex before Apex filed the instant lawsuit. He explained that Fry's does competitive shopping and lowers prices, sometimes below cost, to match the prices of its competitors. Cheng testified Fry's sells items below cost "[t]o be competitive, to increase customer accounts . . . and to make sure that we're not exposed to inventory risk, because technology does change very, very quickly, so if – if we see a certain item of us having an over abundance of inventory, we'll go out there at a pretty high [*sic*] price to bring a lot of customers in." He never heard anyone at Fry's say words to the effect that Fry's was going to set a price to destroy a particular competitor.

Scott Anderson, director of electronic components merchandising and operations for Fry's, also testified that he never heard anyone at Fry's talk about destroying competition. To the contrary, he testified that the general view was that competition was good for Fry's, stating: "It's what has made us strong over the years and it's also what is going to make [Fry's competitors] strong if they are willing to compete and continue to

grow the business." When asked why, Anderson stated: "Well, imagine a market place with no competitors, obviously that is not good and that is what anti-trust laws are all about, and those are good things. The reality is, is those people that are willing to compete, actually improve their business model and lower their costs, and that benefits the consumer. That forces us then to do the same. And we become a more efficient business model. We are able to offer better values all the time to the consumer, and it . . . keeps us fresh, and on our toes. It keeps us having to change our business to continue to grow in that business, if you don't, you lose very quickly and you are out."

Based on this testimony, the jury could reasonably find that Fry's made sales below cost for the purpose of fairly competing in the retail marketplace, and not for the purpose of destroying competition or injuring competitors. The court did not err in denying Apex's motion for JNOV as to its first cause of action.

F. *The Issue of Whether the Court Erred in Granting Summary Adjudication of the First Cause of Action as to Bicknell Is Moot*

Apex contends the court erred in granting Bicknell's motion for summary adjudication of the first cause of action for violations of the UPA (loss leader, sales below cost, and locality discrimination) because under section 17095, Bicknell is personally liable for Fry's UPA violations as an officer, director or agent of Fry's who assisted or aided Fry's in the violations. The issue of Bicknell's liability under the first cause of action is moot in light of our affirmance of the order denying Apex's motion for JNOV as to that cause of action. Bicknell cannot be held liable for aiding or assisting Fry's in alleged UPA violations for which Fry's has no liability.

G. *The Court Did Not Abuse Its Discretion in Denying Apex Cost of Proof Sanctions*

Apex's final contention on appeal is that the court committed reversible error in denying its motion for "cost of proof" sanctions under subdivision (o) of former Code of Civil Procedure section 2033 (CCP section 2033), which governs requests for admission (RFA's).[24] Apex contends that because the jury made findings establishing the truth of certain ultimate facts that Apex asked Fry's to admit but Fry's denied in its responses to Apex's RFA's Nos. 17 through 20 concerning loss leaders, Apex is entitled to recover the costs and attorney fees it incurred in proving those facts.[25]

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24 CCP section 2033 was repealed July 1, 2005 (Stats. 2004, Ch. 182, § 22), as part of a nonsubstantive reorganization of the Civil Discovery Act of 1986. (Code Civ. Proc., §§ 2016 et seq.) Subdivision (o) of CCP section 2033 was replaced, without substantive change, by Code of Civil Procedure section 2033.420.

25 RFA Nos. 17 and 18 both asked Fry's to admit: "More than once since April 1997 Fry's Electronics' San Diego store has sold as a loss leader an item of merchandise advertised by Fry's for sale in the San Diego Union-Tribune newspaper." However, the two RFA's used different definitions of the term "loss leader." RFA No. 17 stated: "The term 'loss leader' is being used in this request in the sense of California Business & Professions Code [section] 17030[, subdivision] (a), which provides: 'Loss leader' means any article or product sold at less than cost[ w]here the purpose is to induce, promote or encourage the purchase of other merchandise." RFA No. 18 stated: "The term 'loss leader' is being used in this request in the sense of California Business & Professions Code [section] 17030[, subdivision] (c), which provides: 'Loss leader' means any article or product sold at less than cost where the effect is to divert trade from or otherwise injure competitors."

RFA Nos. 19 and 20 both asked Fry's to admit: "More than once since April 1997 Fry's Electronics' San Diego store has sold as a loss leader an item of merchandise advertised by Fry's for sale in the San Diego Union-Tribune newspaper wherein the quantity to be purchased by any one customer was advertised as limited to one item." RFA No. 19 set forth the definition of "loss leader" of section 17030, subdivision (a) whereas RFA No. 20 set forth the definition of "loss leader" of section 17030, subdivision (c).

Former CCP section 2033, subdivision (o) provided in pertinent part: "If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make this order unless it finds that (1) an objection to the request was sustained or a response to it was waived . . . , (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter, or (4) *there was other good reason for the failure to admit*." (Italics added, repealed by Stats. 2004, ch. 182, § 22.)

"The determination of whether a party is entitled to expenses under [CCP] section 2033, subdivision (o) is within the sound discretion of the trial court. 'On appeal, the trial court's decision will not be reversed unless the appellant demonstrates that the lower court abused its discretion.' [Citation.]" (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 637, fn. 10.) "An abuse of discretion occurs only where it is shown that

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Apex's motion for cost of proof sanctions indicated that it also sought sanctions for the cost of proving its RFA No. 14 (concerning advertising items for sale that Fry's did not have on hand) and the court's ruling denying the motion addresses that RFA. However, we do not address RFA No. 14 because none of the declarations in support of Apex's motion (evidencing costs and attorney fees incurred in proving the truth of the RFA assertions) addressed RFA No. 14 and Apex does not address it on appeal.

the trial court exceeded the bounds of reason. [Citation.] It is a deferential standard of review that requires us to uphold the trial court's determination, even if we disagree with it, so long as it is reasonable. [Citation.]" (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864.)

Apex contends the court committed reversible error by placing the burden on Apex to show that Fry's denials of its RFA's were unreasonable instead of requiring Fry's to show the denials were reasonable.[26] Apex contends the court *impliedly* misallocated that burden in its written order denying cost of proof sanctions by stating: "The court cannot say Fry's failure to unequivocally admit these RFA[']s was unreasonable or that there was no other good reason to deny them." The full context of the portion of the court's ruling regarding the reasonableness of Fry's denials of the loss-leader RFA's is as follows:

> "Although Fry's ultimately denied these requests, it also objected to them because in order for a retailer to be liable for selling a loss leader the retailer must intend to injure competition. *The court cannot say Fry's failure to unequivocally admit these RFA*[*'*]*s was unreasonable or that there was no other good reason to deny them.* The term 'loss leader' can have a negative connotation of unlawfully selling an item below cost. So that plaintiff would not reach the wrong conclusion, Fry's accompanying interrogatory response[27]

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26 Apex states in its opening brief: "[T]he issue presented here is *not* APEX's entitlement to . . . [CCP] § 2033[, subdivision] (o) costs of proof. The questions are, who bears the burden of proof in making and defending such a motion, and what are those burdens?"

27 The interrogatory reference is to Judicial Council form interrogatory No. 17.1 which accompanies RFA's and asks the responding party to state, among other things, all facts upon which the party bases the response if the response is other than an unqualified admission.

> sought to clarify that although Fry's may sell items below cost, it did so for a variety of legally proper reasons.[28] Plaintiff complains that Fry's interrogatory response did not unequivocally admit to selling anything below cost, but the RFA[']s did not merely ask whether Fry's sold any items below cost." (Italics added.)

Read in context, the italicized statement Apex points to as showing the court misallocated the burden of proof is simply a finding (stated in the negative) that Fry's had good reason not to unequivocally admit the "loss leader" RFA's. The ensuing language of the order indicates the court based that finding on *Fry's* clarification that it sold items below cost "for a variety of legally proper reasons." At oral argument on the motion, Fry's counsel "accept[ed] the imposition of the burden on Fry's," and argued that Fry's had established good reason to deny the RFA's. Notwithstanding certain remarks by the court suggesting it viewed Apex as having the burden on the motion,[29] the written order ultimately entered on Apex's motion for cost of proof sanctions shows the court denied the motion based on Fry's showing that its denials were reasonable rather than Apex's

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28 As to each of Apex's RFA Nos. 17 through 20, Fry's stated the following in its response to interrogatory No. 17.1: "To the extent that Fry's has ever sold below some measure of cost, such sale was done in good faith and for legitimate and lawful business purposes. For example and not by way of limitation: 1) Fry's competes with numerous others, and Fry's will lower its prices to match a competitor's price. 2) Fry's reduces prices at times below some measure of its cost, in order to stimulate interest in its stores and attract new and additional customers for the many and diverse products sold by Fry's. 3) Fry's does not sell goods below an appropriate measure of its costs. 4) Fry's sometimes reduces the price of merchandise that does not sell within Fry's initial time projections in order to reduce inventory. 5) Fry's always advertises merchandise at competitive prices with the intention of selling those items."

29 For example, the court stated at oral argument: "I'm not convinced the plaintiff has shown that the four factors under [CCP section] 2033[, subdivision] (o) applies [*sic*] here. And in that regard, I'm not convinced that Fry's acted unreasonably."

failure to show otherwise. Thus, assuming it was Fry's burden to show its denials of the subject RFA's were reasonable, we conclude Fry's met that burden.

Regarding the court's statement that "[t]he term 'loss leader' can have a negative connotation of unlawfully selling an item below cost," Apex contends it is improper to deny an RFA on the ground its admission may carry "negative connotations." We view the issue raised by Apex as being whether it was reasonable for Fry's to deny selling "loss leaders" by explaining why the negative connotations of the term, as it was defined in the RFA's, did not apply to those sales.

In RFA Nos. 17 and 19, Apex defined the term "loss leader" as any item sold at less than cost "[w]here the purpose is to induce, promote or encourage the purchase of other merchandise." (§ 17030, subd. (a).) Fry's could reasonably view these RFA's as having a negative connotation in that they asked Fry's to admit it sold loss leaders for the *sole* purpose of inducing, promoting or encouraging the purchase of other merchandise. To the extent RFA Nos. 17 and 19 do not carry negative connotations, Fry's could still reasonably deny them on the ground it had other legitimate purposes for selling goods below cost.

In RFA Nos. 18 and 20, Apex defined the term "loss leader" as any item sold at less than cost "[w]here the effect is to divert trade from or otherwise injure competitors." (§ 17030, subd. (c).)! This definition clearly has negative connotations and, considering that Fry's was asked to admit or deny selling loss leaders *under that definition*, we conclude Fry's denial and accompanying explanation were reasonable.

Fry's denial of RFA Nos. 18 and 20 was reasonable for the additional reason that those RFA's were improper compound requests. Former CCP 2033, subdivision (c) (5) (now Code of Civil Procedure section 2033.060, subdivision (f)) prohibits RFA's from, among other things, containing subparts or compound requests. In *People ex rel. Dept. of Transportation v. Ad Way Signs, Inc*. (1993) 14 Cal.App.4th 187, the California Department of Transportation obtained a summary judgment on its declaratory relief claim that the defendant's billboard was placed and maintained in violation of permit requirements of the California Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). The Court of Appeal reversed, in part because the summary judgment was based on an admission in response to an improper compound RFA. The court explained: "The first clause of the [RFA] pertained to matters within appellant's personal knowledge, namely, whether Ad Way moved the display in December 1981. The second clause, however, asked appellant *to admit the legal effect of action Caltrans claims to have taken at some unspecified date and time in regard to the permit*. Specifically, Caltrans presented appellant with the statement, 'thereafter, State Permit No. 21502 was cancelled by plaintiff.'" (*People ex rel. Dept. of Transportation v. Ad Way Signs, Inc.*, *supra*, at p. 200, italics added.)

RFA Nos. 18 and 20 are similarly compound, as they requested Fry's to admit to selling loss leaders – a matter within Fry's personal knowledge – and to also admit the effect of its action on unspecified competitors at unspecified times (i.e., that the effect of its actions was to divert trade from or otherwise injure competitors). Because the second

part of the request asked Fry's to admit to a matter that could not be presumed to be within its personal knowledge, Fry's denial of RFA Nos. 18 and 20 was reasonable.

The court did not exceed the bounds of reason in finding Fry's reasonably refused to unequivocally admit RFA Nos. 17 through 20 and, accordingly, denying Apex's motion for cost of proof sanctions.

IV

*FRY'S APPEAL*

A. *The Court Did Not Err in Permanently Enjoining Fry's from Violating Section 17504*

The judgment states that the court "found in favor of [Apex] and against Defendants Fry's and Randy Fry on both the Second and Third causes of action by granting the injunction sought relative to Business and Professions Code Section 17504."[30] The judgment permanently enjoins Fry's and Randy Fry "from advertising any consumer goods for sale at a single unit price where the goods are sold only in multiple units and not in single units unless the advertisement also discloses, at least as prominently, the price of the minimum multiple unit in which they are offered. No

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30 Section 17504 provides, in relevant part: "(a) Any person, partnership, corporation, firm, joint stock company, association, or organization engaged in business in this state as a retail seller who sells any consumer good or service which is sold only in multiple units and which is advertised by price shall advertise those goods or services at the price of the minimum multiple unit in which they are offered. [¶] (b) Nothing contained in subdivision (a) shall prohibit a retail seller from advertising any consumer good or service for sale at a single unit price where the goods or services are sold only in multiple units and not in single units as long as the advertisement also discloses, at least as prominently, the price of the minimum multiple unit in which they are offered."

restitution shall be ordered in connection with the Court's issuance of this injunction." Fry's contends the permanent injunction should be reversed because (1) section 17504, subdivision (b) does not require the multiple unit price to be displayed at least as prominently as the single unit price and (2) there is insufficient evidence that continued violations of section 17504 were likely to occur.

"'A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action . . . against a defendant and that equitable relief is appropriate.' [Citation.] The grant or denial of a permanent injunction rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion. [Citation.] The exercise of discretion must be supported by the evidence and, 'to the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, [we] review such factual findings under a substantial evidence standard.' [Citation.] We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court's order. [Citation.]" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390.) "[A] court's power to grant injunctive relief to prevent future unfair business practices is '"extraordinarily broad. "' [Citation.]" (*People v. First Federal Credit Corp*. (2002) 104 Cal.App.4th 721, 735-736.)

1. *Construction of section 17504, subdivision* (*b*)

Fry's contends the court erred as a matter of law in determining that section 17504, subdivision (b) *requires* the multiple unit price to be displayed at least as prominently as

the single unit price. Fry's argues that section 17504, subdivision (b) does not create a standard of false advertising apart from section 17500, but rather merely creates a safe harbor provision. Fry's reasons that under section 17504, subdivision (b), the display of the single unit price in an advertisement of a multiple unit item cannot form the basis of false advertising under section 17500 if the advertisement also displays, at least as prominently, the minimum multiple unit price. For advertisements that do not display the minimum multiple unit price as prominently as the single unit price or, in Fry's words, advertisements that fall outside the safe harbor provision of section 17504, subdivision (b), Fry's argues there is no liability unless the plaintiff proves the advertisement's display of the single unit price constitutes false advertising or unfair competition. Fry's contends there was no evidence here that its advertisements of multiple unit goods constituted false advertising or unfair competition.

Fry's further argues that section 17504, subdivision (b) could reasonably be interpreted as prohibiting a retail seller from advertising a single unit price more prominently than the multiple unit price only if some other statutory provision prohibited retailers from advertising the single unit price of a multiple unit item. If there were such a provision, Fry's argues, section 17504, subdivision (b) could be reasonably construed as providing an exception to the statutory prohibition. Fry's reasons that because there is no general statutory prohibition against a retail seller advertising the single unit price of a multiple unit good, the only statutory restrictions against such advertising are the general prohibition against false advertising in section 17500 and the unfair competition provisions of section 17200.

Fry's interpretation of section 17504, subdivision (b) does not accord with the plain meaning of the subdivision's language. Section 17504, subdivision (b) states, in essence, that subdivision (a) does not "prohibit a retail seller from advertising any consumer good or service for sale at a single unit price where the goods . . . are sold only in multiple units . . . *as long as* the as the advertisement also discloses, at least as prominently, the price of the minimum unit in which they are offered." (Italics added.) The necessary corollary of this language is that subdivision (a) *does* prohibit a retail seller from advertising any consumer good or service for sale at a single unit price where the goods are sold only in multiple units if the advertisement *does not* disclose, at least as prominently, the price of the minimum unit in which they are offered. The court did not erroneously construe section 17504, subdivision (b).[31]

2. *Sufficiency of the evidence*

We reject Fry's contention that the injunction portion of the judgment must be reversed because there is insufficient evidence that continued violations of section 17504 were likely to occur. "The injunctive remedy should not be exercised 'in the absence of any evidence that the acts are likely to be repeated in the future. [Citation.]' Injunctive relief can be denied where the defendant voluntarily discontinues the wrongful conduct.

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31 In any event, whether Fry's failure to display a minimum unit price at least as prominently as the item's multiple unit price is deemed a violation of section 17504, subdivision (b) or simply false or misleading advertising under section 17500, the conduct is unlawful and subject to being enjoined under section 17203.

[Citation.]" (*Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548, 574, quoting *Mallon v. City of Long Beach* (1958) 164 Cal.App.2d 178, 190.)

Here, the court in its statement of decision noted it had ruled in Apex's favor on the section 17504 issue in its order on a motion for summary adjudication. The court was referring to its order granting Apex's motion for summary adjudication of defendants' 22nd and 24th affirmative defenses to Apex's third cause of action for unfair competition to the extent the cause of action was based on violation of section 17504. The 22nd affirmative defense alleged that "any purported wrongful acts by Defendants have ceased and there is no reasonable likelihood that such acts will reoccur." The 24th affirmative defense alleged that "the purported conduct of Defendants complied with applicable law; therefore, the conduct was neither unfair nor unlawful." The court ruled that certain advertisements of Fry's presented in support of Apex's motion violated section 17504 on their face because they prominently displayed a single unit price and stated a minimum multiple unit price in significantly smaller print. The court ruled that a declaration by Kolder failed to raise a triable issue of fact as to either defense because it "confirms that this practice is ongoing."

In its statement of decision after trial, the court correctly noted that evidence presented to the jury "showed that even after the Court's ruling in favor of the plaintiff on the Section 17504 issue, the corporate defendant had on two occasions advertised in ways the Court had previously found inappropriate." The court also correctly noted that although Kolder had directed that, in the court's words, "the font size for the individual unit [price] as well as the bundled unit [price] be the same in the advertisement of

products[,]" Kolder could not recall whether she directed that the two prices be printed in the same color, and she testified that she did not tell the purchasing managers anything about the use of bursts.[32] The court further noted Kolder's testimony that a burst is used in an advertisement to draw attention and that Fry's had "no policy on whether a single unit price should be bursted while the bundle price is not." The court found Apex met its burden of proving Fry's violated section 17504 by not disclosing the minimum multiple unit pricing "at least as prominently" as the single unit pricing. The court also found that "in light of the evidence presented, . . . the acts are likely to recur." "

We conclude substantial evidence supports these findings.[33] The court could reasonably conclude that Fry's use of bursts in the advertisements in question violated section 17504's requirement that multiple unit prices be disclosed "at least as prominently as" single unit prices. Based on Kolder's testimony that Fry's lacked a policy against such use of bursts and the evidence of Fry's violations of section 17504 after the court's summary adjudication ruling on the issue, the court could reasonably find that violations

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32 Kolder described "bursts" as "those starry things" that contain "little additional blurbs" to draw the reader's attention to the contents of the burst.

33 Kolder admitted to being aware of the court's summary adjudication ruling on the issue of section 17504. She testified that Fry's changed its advertising to make the "individual price type font . . . the same size as the multiunit type font." Kolder was shown an offending advertisement and admitted it was published after the change in advertising that she testified to implementing. She admitted Fry's used bursts and had no policy as to whether the single unit price of a multiple-unit item would be placed inside a burst, and she identified several advertisements by Fry's in which bursts were used in that way.

of section 17504 by Fry's were likely to recur. We find no abuse of the court's broad discretion to grant injunctive relief to prevent future unfair business practices.

## DISPOSITION

Apex's request for judicial notice is denied. Fry's request that we not consider Apex's lodged exhibits is denied. The judgment is reversed as to the adjudication of Apex's fourth cause of action for intentional interference with prospective economic advantage in favor of Fry's. The judgment is otherwise affirmed. The orders denying Apex's motion for JNOV as to its first cause of action and denying Apex's motion for cost of proof sanctions are affirmed. The parties are to bear their own costs on appeal.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.